United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,988

WILLIAM S. HALPERN & LOUIS N. SELTZER,
d/b as BURLINGTON BROADCASTING CO.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

JOHN J. FARINA, tr/as
MT. HOLLY-BURLINGTON BROADCASTING CO.,

Intervenor.

Appeal from Decision and Order of the
Federal Communications Commission

PHILIP BERGSON

ARTHUR SCHEINER

Wilner & Bergson
1343 H Street, N.W.
Washington 5, D. C.

Attorneys for Appellant

QUESTIONS PRESENTED

Pursuant to a Prehearing Stipulation dated November 5, 1963, approved by Prehearing Order dated November 12, 1963, all parties agree that the following questions are presented:

1. Whether the Commission's findings and conclusions with respect to the financial qualifications of John J. Farina, tr/as Mt. Holly Broadcasting Company and that applicant's representations relating thereto were supported by substantial evidence of record.

2. Whether the Commission's findings and conclusions with respect to the comparative merits of appellant and John J. Farina, tr/as Mt. Holly Broadcasting Company were supported by substantial evidence of record.

INDEX

TABLE OF AUTHORITIES

Cases:

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,988

WILLIAM S. HALPERN & LOUIS N. SELTZER,
d/b as BURLINGTON BROADCASTING CO.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

JOHN J. FARINA, tr/as MT. HOLLY-
BURLINGTON BROADCASTING CO.,

Intervenor.

Appeal from Decision and Order of the
Federal Communications Commission

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a Decision and Order of the Federal Communications Commission ("Commission") released June 14, 1963 (R. 2316-2332) denying the mutually exclusive applications of Appellant, William S. Halpern and Louis N. Seltzer, d/b as Burlington Broadcasting Company ("Burlington Broadcasting") and of Burlington County

Broadcasting Company ("Burlington County") for a construction permit for a new standard broadcast station to operate on 1460 kc, 5 kilowatts, DA-2 unlimited time in Burlington, New Jersey, and Mt. Holly, New Jersey, respectively; and granting the mutually exclusive application of John J. Farina tr/as Mt. Holly-Burlington Broadcasting Company ("Farina") for the same facility in Mt. Holly, New Jersey, insofar as it requested a daytime authorization only.[1]

This appeal is taken pursuant to Section 402(b) of the Communications Act of 1934, as amended (47 U.S.C. Sec. 402(b)) and Section 10 of the Administrative Procedure Act (5 U.S.C. Sec. 1009).

STATEMENT OF THE CASE

By order released February 7, 1961, the above described applications were designated by the Commission for consolidated hearing upon specified issues.[2]

Public hearings in the above described proceedings were held commencing on June 12, 1961 and the record was closed on December 6, 1961. Proposed findings and conclusions were filed by the several applicants and the Commission's Broadcast Bureau. On May 2, 1962, the hearing examiner released an Initial Decision looking toward grant of the applications of Burlington County and denial of the two other applications (R. 2239-2306).

Farina's application in this proceeding for Mt. Holly was filed on February 26, 1960. In Section III of that application, which relates to the applicant's financial qualifications, Farina furnished the following information (R. 2343):

---

[1] The denial of the nighttime proposal is not pertinent to the instant appeal.

[2] The issues specified by the Commission which are pertinent to this appeal are set forth below.

"1.c. The proposed construction is to be financed and paid for in the following manner (including specified statements as to the approximate amount to be met and paid from each source.) The financial plan should provide for any additional construction costs should the actual cost exceed the original estimated cost, and also for the early operation of the station in the event operating expenses should exceed operating revenues:

Existing Capital	New Capital	Loans from banks or others	Profits from existing operations
'In excess of $54,000'	'--'	'--'	'--'

Donations	Credit, deferred payments, etc.	Other sources (specify)
'--'	'$36,600.'	'--'

* * * * *

"3. Furnish the following information with respect to the applicant only. If the answer is None to any or all items, specifically so state:

"a. Amount of funds on deposit in bank or other depository

'In excess of $54,000'

"b. Name and address of the bank in which deposited

'Fidelity Union Trust, Newark, N. J.'

"c. Name and address of the party in whose name the money is deposited

'John J. Farina, 321 Summer Avenue, Newark, N. J.'

"d. Conditions of deposit (in trust, savings, subject to check, on time deposit, who may draw on account and for what purpose, or other condition)

'Savings and checking accounts may be drawn upon by John J. Farina for any purpose'

"e. Whether the funds were deposited for the specific purpose of constructing and operating the station

'No' "

Farina also submitted as his Exhibit No. 2 the following "Plan of Financing" (R. 2352):

> "The total initial cash requirements of the station proposed herein may be summarized as follows:
>
> | | |
> |---|---|
> | Down payment to RCA on equipment (see attached letter of credit) | $12,200. |
> | First year's rental on studios and transmitter site | 4,900. |
> | Remodelling and constructing buildings | 4,000. |
> | Miscellaneous, contingencies, fees, furniture and fixtures, etc. | 12,000. |
> | Three months' operating expenses | 20,000. |
> | | $53,100. |
>
> "To meet the above case requirements, Mr. Farina has cash on hand in excess of $54,000 (See Section III, Paragraph 3). He has no liabilities. It is clear, therefore, that he is fully qualified to construct and operate the proposed broadcast facility.
>
> "Mr. Farina had a net income after federal taxes in excess of $5,000 during each of the past two years."

On August 30, 1960, Farina amended his application to submit, inter alia, revised cost and revenue estimates and a revised plan of financing. Again, it was represented that existing capital is "in excess of $54,000" (R. 2410-2413). In the Revised Plan of Financing it was represented that the applicant will have available liquid resources in excess of $104,000 which include "cash on hand in excess of $54,000 (see original application)" (R. 2412). Thereafter, the application was again amended on September 13, 1960, to furnish a revised letter of credit (R. 2434-2435).

On September 29, 1961, the Commission released a Memorandum Opinion and Order granting a petition to enlarge issues filed June 12, 1961 by appellant which requested the addition of issues to determine Farina's financial qualifications and whether other parties have an undisclosed interest in the application. In granting the above-mentioned request, the Commission stated:

"Underlying the petitioner's request is an alleged remark by Farina that his brother-in-law was in partnership with him in the above-captioned Mount Holly proposal, and upon the fact that Farina did not have on deposit in the bank named in his application form the $54,000 with which he proposed to construct his station. Farina denies that any other person has an interest in his proposal, and while conceding that he did not have $54,000 on deposit in the bank named in his application form, he explains that this error was due to his misunderstanding of the application form. To resolve any doubts as to his financial qualifications, Farina supplies evidence of a $53,000 deposit made by him in another bank several weeks after the filing of the instant petition. He does not, however, explain the source of the funds thus deposited, and under the circumstances here presented it is the Commission's view that the entire matter should be explored at an evidentiary hearing. Both of the requested issues will therefore be added" (R. 295-296).

The issues specified by the Commission in its Order dated February 7, 1961, as amended by its Order September 29, 1961, insofar as pertinent to the instant appeal are as follows (R. 186-187, 295-296):

* * * * *

"9. To determine, in the event it is concluded that a choice between the instant applications cannot be made on considerations relating to Section 307(b), which of the operations proposed in the above-captioned applications would best serve the public interest in the light of the evidence adduced pursuant to the foregoing issues and the record made with respect to the significant differences between the applicants as to:

"a) The background and experience of each having a bearing on the applicant's ability to own and operate the proposed station.

"b) The proposals of each of the instant applicants with respect to the management and operation of the proposed station.

"c) The programming service proposed in each of the instant application.

"10. To determine, in the event it is concluded pursuant to Issue No. 8 that one of the proposals for Mt. Holly should be favored, which of the two proposals for that city would better serve the public interest, convenience and necessity in light of the evidence adduced pursuant to the foregoing issues

and the record made with respect to the significant differences between the applicants as to:

"a) The background and experience of each having a bearing on the applicant's ability to own and operate its proposed station.

"b) The proposals of each of the applicants with respect to the management and operation of the proposed station.

"c) The programming service proposed in each of the said applications.

"11. To determine whether John J. Farina, tr/as Mt. Holly-Burlington Broadcasting Company is the real party in interest in his above-entitled application and whether other parties have an undisclosed interest in the said application.

"12. To determine whether John J. Farina, tr/as Mt. Holly-Burlington Broadcasting Company, is financially qualified to construct and operate the station for which he seeks a construction permit in this proceeding.

"13. To determine, in the light of the evidence adduced pursuant to the foregoing issues which, if any, of the instant applications should be granted."

In the Initial Decision the Hearing Examiner recommended a grant of the application of Burlington County. Upon a review of the facts of record and his own findings of fact, the Hearing Examiner made findings and conclusions to the effect that Farina is financially qualified, but that he had misrepresented his finances to the Commission; and that he had been guilty of a lack of candor with the Commission respecting his finances (R. 2287-2290).

In evaluating Farina's preparation of his application and particularly his program "contacts", the Examiner expressed doubt concerning the thoroughness, conclusiveness and reliability of such "contacts" (R. 2273-2274). In his conclusions, the Hearing Examiner stated that:

> "These witnesses all categorically disputed Farina's testimony that he had contacted them respecting his proposal at Mount Holly. At least three of the four witnesses labeled as false the representations made by Farina that they had been interviewed respecting his proposed station" (R. 2301).

On April 8, 1963, Farina filed a "Motion for Limited Reopening of Record" which requested an opportunity to proffer further evidence with respect to Mr. Farina's truth and veracity concerning representations made by him in his application with respect to funds on deposit; and with respect to his claimed "contacts" with four individuals in connection with the preparation of his proposed programming (R. 3148-3163).

On June 14, 1963, the Commission reversed the Hearing Examiner's Initial Decision, granted Farina's application and denied the applications of Appellant and Burlington County (R. 2316-2332).

STATUTE INVOLVED

The relevant portions of the Statute involved are set forth in the Appendix to this Brief.

STATEMENT OF POINTS

1. The Commission's conclusion that Farina was not guilty of misrepresentation with respect to his finances is unsupported by substantial evidence.

2. The preferences accorded Farina under the criteria of (1) planning and preparation, and (2) broadcast experience, are not supported by substantial evidence.

SUMMARY OF ARGUMENT

1. The threshold question presented with respect to the Farina application is whether that applicant is absolutely disqualified by reason of misrepresentations and lack of candor concerning his financial qualifications. The undisputed facts of record establish that Farina represented to the Commission that he had in excess of $54,000 on deposit in the Fidelity Union Trust Company, Newark, New Jersey, when in fact he had only nominal sums in that bank; and that the said amount was allegedly

". . . in a cache in his parents' home." The purported justification by the Commission to the effect that the Commission's application form is misleading and that there was no motive for such a willful deception is contrary to the evidence of record and erroneous as a matter of law.

2. The preferences accorded Farina under the criteria of (1) planning and preparation and (2) broadcast experience are unsupported by the evidence of record, and are based upon an unwarranted rejection of the Hearing Examiner's conclusions concerning (1) the thoroughness, conclusiveness and reliability of Farina's preparation and planning, and (2) Farina's "minimal" broadcast experience.

ARGUMENT

I.

THE COMMISSION'S FINDINGS AND CONCLUSIONS WITH RESPECT TO FARINA'S REPRESENTATIONS CONCERNING FINANCING ARE DEMONSTRABLY CONTRARY TO FACT AND ERRONEOUS IN LAW

The Hearing Examiner made explicit findings to the effect that in his application for the facilities involved herein, Farina had been guilty of misrepresentations and a lack of candor with respect to his finances.[3] Thus the Hearing Examiner found:

> "104. Farina's financing is a novel and intriguing story. This was brought out as Issue No. 12 and squarely points up the question as to whether Farina is financially qualified to construct and operate his proposal herein. In his application filed February 26, 1960, Farina represented that he had in excess of $54,000 on deposit with the Fidelity Mutual Trust Co. of Newark, New Jersey. He never had $54,000 in an account at the Fidelity Mutual Trust and never at any time from his testimony had that amount on deposit in any bank. Deposits in his

---

[3] Farina's original application was filed on February 26, 1960, and was finally amended on September 13, 1960, without any disclosure of the ". . . cache in his parents' home" (R. 2343, 2434-2435).

bank accounts never exceeded nominal sums at any one time" (R. 2287).

* * * * *

"106. The ramifications leading to the representations of Farina on his original application that he had in excess of $54,000 on deposit with the Fidelity Mutual Trust of Newark, New Jersey, should be explored here" (R. 2288).

* * * * *

"110. It is patently clear from the foregoing that while Farina has $53,000.00 in cash or the equivalent in bonds and a line of credit from a Burlington, New Jersey, bank in the sum of $50,000.00, totalling $103,000.00, this applicant never at any time, as he represented to the Commission in his application, had $54,000 on deposit in a Newark, New Jersey, bank in 1960, or at any other bank. Farina has, as stated above, in addition to the $103,000.00, already spent some funds in connection with his proposed station" (R. 2290).

Accordingly, the Hearing Examiner concluded:

> "27. Arriving at the conclusion here that Farina is financially qualified, does not give sanction to nor condone the misrepresentation to the Commission that he had $54,000 on deposit in the Fidelity Mutual Trust of Newark, New Jersey, and if Issue No. 12 had not been added, his failure to be candid with the Commission respecting his finances would probably never have been developed" (R. 2298).

Although the Commission explicitly recognized that the questions raised by Farina's representations concerning his financial qualifications must be explored in an evidentiary hearing upon a specified issue, its final decision remained completely silent on this score. Its review of these matters and its findings and conclusions with respect thereto were contained in an Appendix attached to its Decision which set forth rulings on the exceptions to the Examiner's Initial Decision (R. 2330).

In four exceptions (Farina Exceptions 59, 60, 67, 69), Farina excepted to the findings and conclusions of the Examiner (I.D. Findings Pars. 104, 106 and 110 and Conclusions Par. 24) that he had represented

to the Commission that he had in excess of $54,000 on deposit with the Fidelity Mutual Trust Company of Newark, New Jersey as contrary to the record (R. 3091, 3095). In support of these exceptions, reliance was placed on Tr. 2129-2130. Further exceptions were taken (Farina Exception 68) to the failure to conclude ". . . that Farina's depositing $53,000 in cash in his attorney's office the very morning after his finances had been challenged by Burlington Broadcasting demonstrates the bona fides of Farina's representation that he had approximately $54,000 cash on hand available for construction of his proposed station (Tr. 2130)" (R. 3095); and exception was taken (Farina Exception 70) "to the conclusion (Par. 27) that Farina has failed to be candid with the Commission as an unwarranted presumption unsupported by the record and contrary to law" (R. 3095). Finally, in this regard, exception was taken (Farina Exception 71) as follows:

"71. To the failure to conclude substantially as follows: Farina is by nature very frugal in the matter of personal expenditures. Since his sophmore year of high school, he has been able to save virtually all of his income (after Federal taxes) and has seriously devoted himself to this program of saving in order that he might some day acquire a broadcast station. His parents have assisted him in his endeavor, and over a period of some 20 years, he has deposited his savings in a receptacle in his home, accumulating in excess of $54,000 by the time his application was filed. His attorney designated the money as 'cash on hand' in Farina's application.

"During this proceeding, an allegation was made by Burlington that Farina did not in fact have available to him $54,000 for use in construction of his station, and the following morning Farina went to his attorney's office with $53,000 in cash which was then converted by the attorney into U. S. Bonds in Farina's name. There is no question but that Farina now has in excess of $53,000 available to him. At no time in this proceeding was it ever indicated or even intimated that this money was not Farina's. He explained clearly and reasonably the manner in which he had accumulated the sum in question. He has further demonstrated that even if he pays cash for all of his equipment, this $53,000 together with a $50,000 bank loan commitment will be more than sufficient to permit him to construct his proposed station and operate it

with a staff he has proposed for an initial period of three months -- even if the station were, during that time, to receive no revenue whatever. Accordingly, the determination originally made by the Commission at the time this application was designated for hearing that Farina is financially qualified to construct and operate his proposed station must be affirmed" (R. 3095-3096).

The position of the Broadcast Bureau was diametrically opposite to the position of Farina and the Bureau contended that Farina's deceptions and misrepresentations virtually required the absolute disqualification of his application. The Bureau asserted:

"Exception No. 6

"We except to the Examiner's failure to conclude in paragraph 37 that Farina, having made misrepresentations with regard to his financing in his application, and with regard to his activities in connection with determining the needs of his community, has shown himself to be lacking in the requisite character qualifications to be a licensee of the Commission and must suffer a determinative comparative demerit" (R. 1582).

In an accompanying "Brief in Support of Broadcast Bureau's Exceptions to Initial Decision", the Bureau asserted that:

"Our final Exception goes to the failure to weigh expressly against applicant Farina his lack of candor. Farina, one of the two applicants for Mt. Holly, misrepresented hisfinancial status in his application by representing that he had $53,000 on deposit in a named bank. This was not so. Coupled with this is the sworn testimony by individuals that Farina had falsely represented having discussed his programming proposals with them. This testimony contrary to the Examiner's conclusion, was nowhere directly controverted. Certainly, the Commission has a right to expect and must indeed insist upon a high degree of truthfulness and candor on the part of those seeking to be entrusted with broadcast licenses. Mr. Farina has failed to meet this standard" (R. 1589-1590).

The Commission granted all of the foregoing Farina exceptions as follows:

"59, 60, 67 - 71

"Granted, and Findings 104, 106 and 110 are corrected to show that Farina represented in his application, in response to Item 3a of Section III, that he had 'In excess of $54,000' 'on deposit in [a] bank or other depository', and that, to the extent that it was on deposit in a bank (Item 3b), as distinguished from other depositories, it was in 'Fidelity Union Trust, Newark, N. J.' In fact, he had a small sum in Fidelity Union Trust, and more than $53,000 in a cache in his parents' home. The somewhat ambiguous nature of questions 3a and b of Section III of the application (in that question 3b assumes that the amount described in 3a is deposited in a bank), combined with the total absence of any motive or evidence of intent to mislead the Commission, persuades us that Farina was not guilty of a misrepresentation" (R. 2330).

As noted above, the Broadcast Bureau had explicitly excepted to ". . . The Examiner's failure to conclude that Farina, having made misrepresentations with regard to his financing in his application . . . has shown himself to be lacking in the requisite character qualifications to be a licensee. . ." Although the Commission's Decision was silent on these matters this exception was disposed of as follows:

"Exception No. 6 Denied, for the reasons stated in the Decision" (R. 2331).

Finally, with respect to Farina's request to reopen the record, the Commission stated:

"33. The above determination has been reached without consideration being given to Farina's 'Motion for Limited Reopening of Record' filed April 8, 1963, and pleadings responsive thereto, which will, therefore, be dismissed as moot" (R. 2325).

The question presented herein is whether the Commission's rejection of the findings of its Hearing Examiner and the Broadcast Bureau are based upon substantial evidence; and whether the Commission's conclusions are reasonable and rational inferences from its findings.[4]

---

[4] Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1001,Sec. 10, 1946; Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474 (1949); Johnston Broadcasting Co. v. Federal Communications Commission, 85 U.S. App. D.C. 40, 175 F. 2d 351 (1949).

It is submitted that the record in this proceeding does not even remotely support the Commission's findings. The fact is that Farina falsely represented his financial position to the Commission. For, Farina explicitly represented in his application that he had on deposit in "Fidelity Union Trust" a sum "in excess of $54,000" when in fact, as the Examiner found, deposits in his bank "accounts never exceeded nominal sums at any time" (R. 2287). Nevertheless, it was the Commission's view that Farina was misled by ". . . the somewhat ambiguous nature of questions 3a and 3b of Section III . . .". Even if it were assumed arguendo that the form is ambiguous[5] ". . . in that it assumes that the amount described in 3a is deposited in a bank . . .", no rational or remotely acceptable explanation could conceivably excuse the representation that the conditions of such "deposit" were "savings and checking accounts . . .". None appears on the record and the Commission did not even purport to rely on any explanation or justification of this further blatant misrepresentation. The only testimony or other evidence of record in this regard (which was relied upon by the Commission) was the following statement by Farina:

> "When I read it, as I recall, its cash or on deposit and either receptacles, something in that manner, and I assumed it meant that I had $54,000, and I had $54,000" (Tr. 2130).

The foregoing statement which constitutes Farina's complete "explanation" is, on its face, incoherent and virtually unintelligible. Assume, however, that full credence is given this "explanation", it nevertheless must be concluded that Farina knowingly and willfully deceived the Commission when he represented that the sum of $54,000 was "on deposit" (albeit in a "receptacle") and the conditions of such deposit were "savings and checking accounts [which] may be drawn upon by John J. Farina for any purpose" (R. 2343).

---

[5] This assumption is exceedingly difficult to accept. The form was adopted more than sixteen years ago for all broadcast applications – AM, FM and TV (12 F. R. 7079, October 13, 1947). It has been used in thousands of applications and it is virtually impossible to see how Farina, despite the benefit of broadcast counsel, was innocently misled into deceiving the Commission.

In the light of the foregoing it is submitted that Farina's self-serving exculpatory statement quoted above does not meet the test of substantial evidence to support the Commission's conclusion; and that such conclusion is not a reasonable and rational inference from such testimony. Moreover, all the other facts of record are persuasive that Farina's admittedly false representation concerning his finances was willful and deliberate. Farina is no novice in the preparation of broadcast applications. On the contrary, the instant application is the third which he has prepared or filed or with which he has been associated (R. 2271).

Nor can Farina claim that the misrepresentation was an innocent oversight or error which resulted from his haste in filing a last-minute application; for in the seventh month period that elapsed since the filing of his original application, Farina reviewed the representations which he first made concerning the funds allegedly available to him. Thus, on September 6, 1960, and again on September 13, 1960, Farina subjected his financial showing to a careful and searching scrutiny, as a result of which he revised and amended his estimates for (1) the total cost of construction; (2) cost of operation for first year; (3) revenues for first year; and (4) miscellaneous items. In these amendments, he also furnished the Commission with a revised plan of financing and with a new letter of credit; and thereafter with a revised letter of credit (R. 2410-2413, 2434-2435). Nevertheless, despite these extensive and successive amendments relating to his financial qualifications, he made no attempt to correct the misrepresentation first set out in his application.

The Commission also erred when it concluded that ". . . the total absence of any motive or evidence of intent to mislead the Commission persuades us that Farina was not guilty of a misrepresentation." An obvious motive to mislead the Commission exists in avoiding an evidentiary hearing on the "novel and intriguing story . . ." (R. 2287) of Mr. Farina's claimed financial qualifications. Indeed, Farina did not even disclose this "novel and intriguing story" in his response to Appellant's petition to enlarge the issues with respect to Farina's financial qualifications. It is

literally incredible that if Farina had voluntarily disclosed that his claim of financial qualifications was based on a ". . . $53,000 in a cache in his parents' home" (R. 2330) that the Commission would not, on its motion, designate this matter for an evidentiary hearing, instead of finding as the Commission did, that Farina was financially qualified.[6]

In any event, the Commission erred as a matter of law in concluding that the claimed absence of apparent motive is a mitigating factor. As this Court stated in Hall v. Federal Communications Commission, 99 U.S. App. D.C. 77, 237 F. 2d 567 (1956), at 577:

> "[13] Spartan's misrepresentation to the Commission cannot be considered nugatory on any theory that the Commission would have acted similarly even if the truth had been revealed. 29/ 'The fact of concealment may be more significant than the facts concealed. The willingness to deceive a regulatory body may be disclosed by immaterial and useless deceptions as well as by material and persuasive ones. We do not think it is an answer to say that the deception was unnecessary and served no purpose.' Federal Communications Comm. v. WOKO, 1946, 329 U.S. 223, 227, 67 S.Ct. 213, 215, 91 L.Ed. 204. Nor would it matter if Spartan's lack of candor were intended to deceive the Columbia Broadcasting System rather than the Commission. In the WOKO case as well, 'the purpose of the concealment was to prevent the facts from becoming known to Pickard's Columbia colleagues.' Id., 329 U.S. at pages 225 - 226, 67 S.Ct. at page 214."
>
> "29/ The Commission said the issue was whether 'Spartan obtained from the Commission an STA upon the basis of misrepresentations of fact'."

---

[6] Moreover, it is probable that such a bizzare claim would have put in issue Farina's basic and overall qualifications: For such a pattern of conduct falls far short of the minimum standard of judgment and normalcy which is necessary to assure the operation of the requested facilities in a responsible and mature manner consistent with the public interest, convenience and necessity.

II.

THE PREFERENCES ACCORDED FARINA BY THE COMMISSION UNDER THE CRITERIA OF (1) PLANNING AND PREPARATION AND (2) BROADCAST EXPERIENCE ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

(1) Planning and Preparation

The Hearing Examiner was unable to accord any preference among the applicants under the criterion of Planning and Preparation. With respect to Farina's claimed preparation, the Hearing Examiner noted two deficiencies. First, the Examiner found that a number of Farina's program proposals and program contacts which he claimed were made in preparation for the instant application, in reality had been made in connection with the preparation of the programming for an application of a friend for a new standard broadcast station in Toms River, New Jersey. The Examiner stated:

> "74. Farina testified that in 1959 and 1960 he had made a substantial number of program contacts in New Jersey relative to his proposal here. Some of these contacts he listed as having made live closer to Toms River, New Jersey, than Mount Holly. Farina conceded that the programs proposed for Mount Holly bear a substantial degree of similarity to the program proposals for the Toms River application which he had prepared" (R. 2271).

Second, the Hearing Examiner found, based upon a detailed review of the testimony of record that Farina did not, in fact, make other contacts which he claimed (I.D. Findings Pars. 74-75, R. 2272-2274). The Examiner found:

> ". . . doubt readily appears as to the thoroughness, conclusiveness and reliability of the evidence respecting the Farina contacts. Here the situation is that four prominent citizens of the area categorically dispute the Farina evidence and at least three of the four witnesses label the testimony as false" (I.D. Findings Par. 75, R. 2273-2274).

In the light of these findings, the Hearing Examiner concluded as follows:

"37. Farina made up his own programming after numerous contacts and visits in the area. He had studied programming and visited radio stations over a long period of time and had his own conception as to what a program for a community such as the one here involved should be. He had made up a program format for a proposal at Toms River, New Jersey, and he admitted that there was a substantial degree of similarity to the program submitted with the Toms River application to the one here involved. A weakness in the Farina endeavor is displayed by the controverted testimony of four witnesses, namely, Amos Hope, Clarence Marshall, Nils Johnson and Miss Mary A. Symonds, all long-time and prominent citizens of the Burlington-Mount Holly area. These witnesses all categorically disputed Farina's testimony that he had contacted them respecting his proposal at Mount Holly. At least three of the four witnesses labeled as false the representations made by Farina that they had been interviewed respecting his proposed station" (I.D. Conc. Par. 37, R. 2301).

Farina's exception (Farina Exception 49) to the foregoing finding in Par. 74 of the Initial Decision was denied by the Commission ". . . as lacking decisional significance" (R. 2329). Farina's exceptions (Farina Exceptions 50-57) to Pars. 74 and 75 of the Initial Decision were granted by the Commission as follows (R. 2330):

"Granted in substance.
See paragraph 14 of the Decision."

In Paragraph 14 of the Commission's Decision, it was concluded as follows:

"14. Farina listed 151 persons whom he had contacted in the preparation of his application. That an opposing applicant was able to present four of the named individuals to testify that they had no recollection of having met or talked with Farina does not seriously detract from the validity of the remaining 147 contacts. Moreover, the record as a whole supports the conclusion that Farina did in fact talk to the four named individuals. Thus, while two persons – Amos Hope and Nils Johnson – testified that they do not remember talking to Farina, they conceded that such a conversation might have taken place. Additionally, Dr. and Mrs. Bisbee, Mount Holly residents who assisted Farina in making local contacts,

> specifically testified as to their having placed calls for Farina from their home to Hope and Johnson, and Mrs. Bisbee recalled calling the office of Miss Symonds, although she did not know the name of the woman with whom Farina spoke there. Miss Symonds and Clarence Marshall, the latter a Sleeper employee for 16 years, both denied having ever spoken with Farina. It must not be overlooked that the contacts in question occurred in 1959, and the testimony with respect thereto was received in November 1961. Also, Farina's purpose in making the contacts was to familiarize himself with the community and to determine its needs and desires, a goal capable of being realized without mention of his own name or of his intent to seek a radio station, and it is hardly surprising that some of those contacted may have been unable to recall the event over two years later" (R. 2320-2321).

Here, too, the Commission's findings and conclusions are not supported by substantial evidence of record. The record reflects that among the program contacts listed by Farina as having been made by him were a personal interview in the summer of 1959 with Amos Hope, President of the Lions Club; a telephone interview in the summer of 1959 with Clarence Marshall of the Mt. Holly Elks; a telephone interview with Nils Johnson, Secretary of the Burnt Cork Association; and a telephone interview in the autumn of 1959 with Mary Symonds, President of the Burlington County Tuberculosis League. All of these individuals were called to testify by Burlington County; and each of them testified that he or she had never met Farina or spoken to him under any circumstances; and that none of them had given permission to use his or her name or position. In addition, Mr. Hope, who was represented to have had a personal interview with Farina, was unable to identify Farina in the hearing room and testified that he did not know if Farina was present (Tr. 2351-2355, 2377, 2382-2385, 2395-2398, 2405-2408).

Accordingly, the basic Commission finding that ". . . the record as a whole supports the conclusion that Farina did in fact talk to the four named individuals . . ." is flatly contradicted by the record. In addition, the Commission simply erred when it asserted that Messrs. Hope and Johnson ". . . conceded that such a conversation might have taken place."

In addition to Mr. Hope's categorical and unequivocal direct testimony to the effect that he had never had a personal interview with Farina and that Farina's representation to the contrary was false (Tr. 2354-2355), he reiterated these statements repeatedly on cross-examination (Tr. 2357, 2358, 2359, 2360, 2362). He did concede the "physical possibility" only that he might have been introduced to Farina (Tr. 2362-2363) but then immediately reiterated once again that he was not introduced to Farina (Tr. 2363). Similarly, Mr. Johnson reaffirmed on cross-examination by Farina's counsel that no one had ever made any inquiries of him concerning the Burnt Cork Association, and testified only that it was conceivable that some one might have called him – but that he did not recall such an inquiry (R. 2401-2403). Further, it should be noted that the Commission's conclusion that Farina did in fact talk to the four named individuals was without even a reference and any evaluation of the explicit and categorical testimony of Mr. Marshall and Miss Symonds. Mr. Marshall as well, reiterated his testimony on cross-examination and asserted unequivocally that he had never spoken to Farina; and that it was not possible that he might have had such a conversation without recalling it (Tr. 2386-2387). Similarly, Miss Symonds testified on cross-examination that she had ". . . never received a call from Mr. Farina" (Tr. 2409).

The Commission's attempt to explain away a possible failure of recollection on the part of the four named witnesses and their inability to identify Farina on the ground that Farina's purpose could have been ". . . realized without a mention of his own name or of his intent to seek a radio station . . ." is not only without any support in the record but is squarely contradicted by the record. Dr. Bisbee, a witness called by Farina, made clear that he introduced Farina (R. 2424-2425) and that a typical telephone call by Farina did disclose his ". . . intent to seek a radio station . . ." (Tr. 2426). Mrs. Bisbee, who was also called as a witness on behalf of Farina, testified that in a "typical telephone call" Farina would say that he was interested in starting a radio station and that her husband, Dr. Bisbee, would introduce Farina (Tr. 2476-2479).

(2) **Broadcast Experience**

The Hearing Examiner accorded Appellant a clear preference under the criterion of broadcast experience. In his findings, the Hearing Examiner noted that Burlington Broadcasting was comprised of two principals, Messrs. Halpern and Seltzer. With respect to Mr. Halpern, the Examiner found that he had extensive broadcast experience including one and a half years in the Army Signal Corps and later as a radio operator on a troop transport in the Pacific, that he had been employed by broadcast stations as an announcer, production director and program director; that in 1949, along with his partner, Mr. Seltzer, he established Radio Station WCOJ and has been since that time General Manager primarily responsible for the day-to-day operation of the station, including the supervision of programming (I.D. Findings Par. 25, R. 2252). With respect to Mr. Seltzer, the Hearing Examiner found that he, too, had extensive radio and broadcast experience, including an amateur's operator's license since the age of 13; that he presently holds other radiotelegraph and radiotelephone licenses; that he had been an employee of the Federal Communications Commission monitoring stations and had other extensive engineering experience for private corporations; that he had been employed as an associate engineer with the Applied Physics Laboratory of the Johns Hopkins University; and that he has participated from the very inception of Radio Station WCOJ in its daily operations, dividing his time among technical matters, administration, sales and programming (I.D. Findings Par. 27, R. 2253).

With respect to Mr. Farina, the Hearing Examiner made the following findings concerning his employment with the National Broadcasting Company (R. 2271):

> "69. Farina joined the National Broadcasting Company, New York City, in 1947 and was assigned to its program division. While at NBC for three years Farina completed courses in radio program production taught by the NBC network staff. He also participated in certain other courses sponsored by NBC, including camera work, direction, and allied subjects. From 1959 on Farina held the

title of 'Qualified Production Assistant' with that network."

* * * * *

"Farina has taken three courses in announcing, each of which lasted over a period of two months under Pat Kelly, who at the time was chief announcer for the NBC network. All of his employment from 1947 down to September 1, 1961, when he resigned in order to devote his full time to prosecuting his application in this proceeding, was with the National Broadcasting Company."

In the light of the foregoing findings, the Hearing Examiner made the following conclusions:

"33. It is patently evident that preference in broadcast experience must be given to the Burlington Broadcasting. Both Halpern and Seltzer have had a long and successful experience in the operation of a radio station at Coatesville, Pennsylvania. It cannot be successfully disputed that there is any degree of comparison between this applicant and the other two on this measure. One of the four principal individuals of Burlington County has had limited broadcast experience and Farina's experience is minimal, regardless of his years of interest in radio work" (R. 2299-2300).

Although Farina did not except to any of the Examiner's findings of fact with respect to his broadcast experience he did except (Farina Exception 76) to the Hearing Examiner's conclusion ". . . that the extent of Farina's broadcast experience is 'minimal' as contrary to the record . . .".

The Commission granted Farina's Exception 76 as follows:

"Granted. See Par. 22 of the Decision" (R. 2330).

In Paragraph 22 of the Decision, the Commission concluded as follows:

"22. Halpern-Seltzer, who have owned and operated Station WCOJ, Coatesville, Pennsylvania, since 1949, are conceded by the other applicants as deserving a first preference here. Farina is preferable to County in this regard by virtue of his employment in the program division of the National Broadcasting Company since 1947. Mr. Freeman, a 10% owner of County, is its only principal with any broadcast experience, and this was gained during a brief period

> of employment with Station WFBG, Altoona, Pennsylvania, nearly thirty years ago. Farina's longer and more current experience thus entitles him to be preferred to County in this area" (R. 2322).

Further, the Commission concluded (Par. 31) "Neither is he [Farina] devoid of experience in broadcasting, for his years spent in NBC's program division, as a 'Qualified Production Assistant' should stand him in good stead in developing programming for his station. Thus, Farina has offered abundant assurance in several criteria, and adequate assurance in each of the others, that a program proposal serving the public interest will be effectuated, and that he may be expected to operate throughout his license term in the public interest" (R. 2325).

Quite clearly, the Commission here, too, rejected the ultimate conclusion of the Hearing Examiner: For, the Hearing Examiner held that the overwhelming superiority of Burlington Broadcasting under the criterion of broadcast experience did not even permit ". . . any degree of comparison between this applicant and the other two . . .". Although the Commission conceded a preference to Burlington Broadcasting on this score, it watered down the decisive superiority of Appellant by relying on the experience of Farina as a "Qualified Production Assistant".

The fact is, however, that the record is entirely devoid of any evidence whatsoever that Farina's experience in this respect would be at all helpful or pertinent ". . . in developing programming for his station." On the contrary, the evidence of record is strongly persuasive that such experience would not be in the least helpful and is entirely irrelevant in evaluating Farina's broadcast experience. The facts of record are simply that Farina worked in a warehouse ". . . with stage hands, electricians, stage carpenters, teamsters, [who] work in the evening putting the equipment in and out of the legitimate theaters in town . . ." (Tr. 2114); and that his duties consisted of such tasks as securing props and transportation (Tr. 2183-2184).

CONCLUSION

Appellant respectfully submits that it has been established that the Commission's decision is not supported by substantial evidence; that in part the decision is not supported by any evidence; and in remaining part is contrary to the evidence.

The determination to grant the application of Farina was based upon (1) a failure to consider and properly evaluate the evidence of record which established that Farina willfully and deliberately misrepresented his finances to the Commission; (2) a failure to consider the evidence which established that he deliberately misstated and exaggerated his program planning and preparation; and (3) a completely unjustified and unsupported reliance upon Farina's "broadcast experience." Accordingly, the Commission's decision must be reversed and the proceeding remanded for reconsideration in the light of the substantial evidence of record.

Respectfully submitted,

PHILIP BERGSON

ARTHUR SCHEINER

Wilner & Bergson
1343 H Street, N. W.
Washington 5, D. C.

Attorneys for Appellant.

December 16, 1963

APPENDIX

STATUTE INVOLVED

Administrative Procedure Act, as amended:

SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion. – (a) Right of Review. – Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

* * *

(c) Reviewable Acts. – Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

* * *

(e) Scope of Review. – So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of Sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

BRIEF FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,988

WILLIAM S. HALPERN & LOUIS N. SELTZER, d/b/as
BURLINGTON BROADCASTING CO.,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

MOUNT HOLLY-BURLINGTON BROADCASTING COMPANY, INC.,
Intervenor.

ON APPEAL FROM A DECISION AND ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

MAX D. PAGLIN,
General Counsel

DANIEL R. OHLBAUM,
Associate General Counsel

HOWARD JAY BRAUN,
Counsel.

Federal Communications Commission
Washington, D.C. 20554

STATEMENT OF QUESTIONS PRESENTED

The questions presented, as agreed to by the parties in a stipulation approved by the Court on November 12, 1963, are set forth in appellant's brief, p. (i).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases: Page:

Administrative Decisions:

Statutes:

*Cases or authorities chiefly relied upon are marked by asterisks.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,988

WILLIAM S. HALPERN & LOUIS N. SELTZER, d/b/as
BURLINGTON BROADCASTING CO.,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

MOUNT HOLLY-BURLINGTON BROADCASTING COMPANY, INC.,
Intervenor.

ON APPEAL FROM A DECISION AND ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

This is an appeal filed pursuant to Section 402(b) of the Communications Act of 1934, as amended, 47 U.S.C. 402(b), and Section 10 of the Administrative Prodedure Act, 5 U.S.C. 1009, from a Decision and Order of the Federal Communications Commission, adopted June 12, 1963, and released June 14, 1963 (R. 2316-2336). The Order (1) granted the application of Mount Holly-Burlington Broadcasting Company, Inc. (Farina), 1/ for a construction permit for a new standard broadcast station to operate on the frequency 1460 kc, 5 kw daytime only, directional antenna, at Mt. Holly, New Jersey; and (2) denied the mutually exclusive applications of William S. Halpern and Louis N. Seltzer, d/b/as Burlington Broadcasting Company

---

1/ This Court by Order of December 19, 1963, granted intervenor's motion for substitution of parties. Intervenor's name was changed from John J. Farina, tr/as Mt. Holly-Burlington Broadcasting Co., to Mount Holly-Burlington Broadcasting Company, Inc.

(Burlington Broadcasting), and Burlington County Broadcasting Company (Burlington County) for similar facilities in Burlington, New Jersey, and Mt. Holly, New Jersey, respectively. Only Burlington Broadcasting has appealed.

It is believed that a more complete statement of the background of the case than that contained in appellant's brief will be helpful to the Court. This background is as follows:

By order released February 7, 1961, the Commission designated the three above-mentioned applications for consolidated hearing (R. 183-188). The Commission found at that time that except as indicated by the specified issues, each of the applicants was legally, financially, technically and otherwise qualified (R. 183). On June 12, 1961, Burlington Broadcasting requested that the issues be enlarged to add an issue on whether Farina possessed the requisite financial qualifications (R. 2693-2703).[1a/] In a Memorandum Opinion and Order released September 29, 1961 (R. 295-296), the Commission granted the petition to enlarge issues and amended its prior designation order of February 7, 1961 (R. 183-188). The issues pertinent to this appeal designated by the order released February 7, 1961, as amended by the order released September 29, 1961, were as follows:

1a/ Burlington Broadcasting also requested the addition of an issue to determine whether Farina was the real party in interest and whether other parties had an undisclosed interest in his application. This issue was also added by the Commission. It was resolved in Farina's favor, and is not involved in this appeal.

* * * * * * *

9. To determine, in the event it is concluded that a choice between the instant applications cannot be made on considerations relating to Section 307(b), which of the operations proposed in the above-captioned applications would best serve the public interest in the light of the evidence adduced pursuant to the foregoing issues and the record made with respect to the significant differences between the applicants as to:

(a) The background and experience of each having a bearing on the applicant's ability to own and operate the proposed station.

(b) The proposals of each of the instant applicants with respect to the management and operation of the proposed station.

(c) The programming service proposed in each of the instant applications.

* * * * * * *

12. To determine whether John J. Farina, tr/as Mt. Holly-Burlington Broadcasting Company, is financially qualified to construct and operate the station for which he seeks a construction permit in this proceeding.

13. To determine, in the light of the evidence adduced pursuant to the foregoing issues which, if any, of the instant applications should be granted.

The evidentiary hearing commenced on June 12, 1961 (Tr. 103).[2/] On May 2, 1962, after the filing of proposed findings and conclusions, the hearing examiner released an Initial Decision looking toward a grant to Burlington County and a denial of the applications of Burlington Broadcasting and Farina (R. 2239-2306).

2/ The "Tr." prefix to a record reference is to the original pagination of the hearing transcript in the record filed with the Court. These transcript pages have not been renumbered in the record.

The hearing examiner found that while Farina was financially qualified to operate the proposed station (R. 2287-2290), he had misrepresented to the Commission the source of his funds (R. 2298). The examiner found that Farina in his application "had represented that he had in excess of $54,000 on deposit with the Fidelity Mutual Trust Company of Newark, New Jersey," since, although Farina had approximately $53,000 in cash, mostly in his home, actual deposits in the bank were nominal (R. 2297-2298). This finding arose from Farina's responses to questions in the application as follows (R. 2343):

> 3. a. Amount of funds on deposit in bank or other depository
> 'In excess of $54,000'
> b. Name and address of the bank in which deposited
> 'Fidelity Union Trust, Newark, N.J.'
> c. Name and address of the party in whose name the money is deposited
> 'John J. Farina, 321 Summer Avenue, Newark, N.J.'
> d. Conditions of deposit (in trust, savings, subject to check, on time deposit, who may draw on account and for what purpose, or other condition)
> 'Savings and checking accounts may be drawn upon by John J. Farina for any purpose'
> e. Whether the funds were deposited for the specific purpose of constructing and operating the station
> 'No' 3/

The examiner found that Farina was a single man of rather abstentious habits who lived with his family without paying room and board, and that as a youth he had expressed a desire to enter broadcasting and had saved all his earnings with that objective in mind (R. 2288). He found that Farina's parents had permitted him to live at home without paying any family expenses, and that since the family

---

3/ In later amendments to the application, Farina stated that he had existing capital in excess of $54,000 (R. 2411).

was apprehensive about placing savings in banks, it kept a family cash receptacle in their home for savings, to which members of the family contributed (R. 2288). He also found that since 1950 it had been expressly agreed upon between Farina and his parents that the funds in the family receptacle belonged to him for use in establishing a radio station, and that at the time Farina's application was filed, he had funds in excess of $53,000 in this receptacle (R. 2289). In addition, the examiner found that when Farina's finances were challenged by the competing applicant, he had immediately withdrawn $53,000 from the home receptacle and delivered this sum to his attorney in New York City, who had promptly converted this money into U.S. Treasury Bonds at the Hanover bank in New York City (R. 2289-2290).

The examiner apparently did not disqualify Farina, but proceeded to the comparative aspects of the case. He accorded Burlington Broadcasting a distinct preference in the area of broadcast experience (R. 2299), gave no preference to any of the applicants in the areas of preparation and planning, or proposed programming (R. 2300-2301), and gave Farina a preference over both Burlington Broadcasting and Burlington County on integration of ownership with management (R. 2302). A preference was given to Burlington County in the category of civic participation (R. 2299). Although he made findings on the comparative criteria as to all of the applicants, the examiner decided that the assignment of frequencies on a fair basis between communities required a grant to one of the Mt. Holly applicants (see Section 307(b) of the Communications Act

of 1934, as amended, 47 U.S.C. 307(b)) (R. 2305-2306). He then preferred Burlington County to Farina.

Farina filed exceptions with a supporting statement to the Initial Decision (R. 3080-3101, 3102-3138). Exceptions were also filed by the Broadcast Bureau of the Commission (R. 1575-1583, 1584-1591), and Burlington Broadcasting (R. 1592-1613, 1614-1632).

The Commission heard oral argument en banc on April 11, 1963 (Tr. 2198-2261). The Commission released its decision on June 14, 1963, with three Commissioners not participating.[4/] While the Commission generally adopted the examiner's findings of fact, it reached different ultimate conclusions on several issues.

The Commission disagreed with the examiner's view that the allocation issue was decisive as between the Mt. Holly applicants and the Burlington applicant (R. 2319).[5/] It agreed with the examiner's conclusion that Farina was financially qualified (R. 2317) and decided the case upon the basis of the applicants' comparative qualifications.

Burlington County, by virtue of its principals' local residence, was given a clear preference for area familiarity, and no distinction was made between Farina and Burlington Broadcasting in this area (R. 2324). A preference was awarded Burlington Broadcasting in the area of broadcast experience, since it was the only

---

4/ Commissioners Lee, Cox, and Loevinger did not participate in this decision.

5/ The Commission stated that Section 307(b) considerations were not controlling in this case in view of the proximity and similarity of the communities involved, the regional channel at issue, the similar coverage of the proposals, and the already well-served reception areas of each.

applicant whose principals had owned and operated a broadcast station. However, Farina's experience with NBC was deemed superior to the brief and non-current experience of one of Burlington County's principals (R. 2324). Farina's complete integration was deemed superior to the full-time integration of a 50% partner of Burlington Broadcasting, and to the full and part time integration of three of Burlington County's minority shareholders (R. 2325). Farina was also awarded a preference in the criteria of preparation, planning, and programming both because of the extent of his contacts and because he had thoroughly related them to his program proposals (R. 2325). Finally, Farina was also preferred on the factor of diversification of control of the media of mass communications, since he was the only applicant not identified with other mass communication media (R. 2325).

With respect to the examiner's findings concerning Farina's financial representations on his application, on which Farina had taken exceptions,[6/] the Commission in the appendix to its decision stated:

> "Granted, and Findings 104, 106 and 110 are corrected to show that Farina represented in his application, in response to Item 3a of Section III, that he had 'In excess of $54,000' 'on deposit in [a] bank or other depository', and that, to the extent that it was on deposit in a bank (Item 3b), as distinguished from other depositories, it was in 'Fidelity Union Trust, Newark, N.J.' In fact, he had a small sum in Fidelity Union Trust, and more than $53,000 in a cache in his parents' home. The somewhat ambiguous nature of questions 3a and b of Section III of the application (in that question 3b assumes that the amount described in 3a is deposited in a bank), combined with the total absence of any motive or evidence of intent to mislead the Commission, persuades us that Farina was not guilty of a misrepresentation" (R. 2330).

6/ Farina exceptions 59, 60, 67-71 to the examiner's initial decision were all granted.

In light of its views as to the merits of the applicants on the comparative factors, the Commission determined that a grant to Farina would best serve the public interest (R. 2362).

SUMMARY OF ARGUMENT

I.

The Commission properly concluded that Farina did not represent to it that he had $54,000 on deposit in a Newark, New Jersey bank. Appellant has failed to show that substantial evidence is wanting to support the Commission's conclusion. Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474; Kidd v. Federal Communications Commission, 112 U.S. App. D.C. 288, 302 F.2d 873.

Farina answered Question 3(a) on the application blank, which inquires as to the "amount of funds on deposit in bank or other depository" by stating "In excess of $54,000," and answered the next question as to "Name and address of the bank in which deposited" by stating "Fidelity Union Trust, Newark, N.J." Both the examiner and the Commission found that Farina was financially qualified and that he actually had more than $53,000 in a family receptacle. His testimony indicated that he assumed the question on the application as to the amount of money "on deposit in bank or other depository" generally meant the amount of cash he had. This was a reasonable response to a question which the Commission recognized might be open to misinterpretation. See Bowles v. Seminole Rock & Sand Co., 325 U.S. 410; Plains Television Corporation v. Federal Communications Commission, 108 U.S. App. D.C. 20, 278 F.2d 854. Finding no motive to deceive or mislead, the Commission properly concluded that Farina was not guilty of misrepresentation.

II.

The Commission properly accorded Farina a preference in the area of preparation and planning. Farina contacted 151 local residents during the preparation of his application for the purpose of ascertaining the program needs of the area he proposed to serve, and then made use of the information so gained in preparing his program proposals. In addition, he conducted his own historical and statistical studies of the Mt. Holly-Burlington area. Appellant makes no argument to show that its preparation was as thorough as Farina's.

The fact that four persons out of the over 150 contacted testified that they had no recollection of having been introduced to Farina, or having discussed his program proposals with him, did not seriously detract from the validity of Farina's showing. The examiner had given no consideration to the possible bias of the witnesses in favor of the principals of Burlington County. Two of them also had not ruled out the possibility in their testimony that Farina had in fact spoken to them and that they had forgotten the occasion. Farina presented the testimony of two persons who assisted him in making his program contacts, and their statements affirmatively corroborated those of Farina. Thus, the Commission had ample support in the record for its conclusion that Farina did in fact talk to these four people. Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474; Tampa Times Company v. Federal Communications Commission, 97 U.S. App. D.C. 256, 259, 230 F.2d 224, 227.

III.

The Commission awarded appellant a distinct preference in the area of broadcast experience, but also concluded that Farina's experience as a production assistant in NBC's program division should aid him in developing programming for his own station. Substantial evidence in the record supports this finding. While employed at NBC in New York, Farina was responsible at various times for the carpentry shop, the prop securing area, and the drapery section. Farina was an assistant supervisor of television facilities and, in this capacity, directed the activities of painters, scenic artists, and carpenters. Moreover, Farina completed courses in radio program production taught by the network staff, and was enrolled in several announcing classes and other network sponsored courses on direction, camera work, and related subjects. From 1959 onwards, Farina held the title of "Qualified Production Assistant" at NBC.

The Commission properly concluded that this experience and training would stand Farina in good stead in developing programming for his own station.

ARGUMENT

I. THE COMMISSION WAS WARRANTED IN CONCLUDING THAT FARINA WAS NOT GUILTY OF MISREPRESENTATION.

Appellant contends (Br. 8-15) that the Commission improperly granted Farina's exceptions to the examiner's conclusion that Farina had misrepresented to the Commission that he had $54,000 on deposit in a Newark bank. We believe that the record as a whole fully supports the Commission's conclusion.

As set forth in the counterstatement, the question arose because, while Farina had more than $53,000 in a home receptacle and a small amount in the Newark bank, he answered Question 3(a) on the application blank, which inquires as to the "Amount of funds on deposit in bank or other depository" by stating "In excess of $54,000," and answered the next question as to "Name and address of the bank in which deposited" by stating "Fidelity Union Trust, Newark, N.J." (R. 2343). Farina also answered a further question as to the conditions of deposit. Appellant insists that the responses to these questions on the application form unquestionably constituted a representation by Farina that he had in excess of $54,000 on deposit in the bank (App. Br. 13). The Commission concluded, however, that since Farina in fact had over $53,000 in his parents' home, and the questions on the form were somewhat ambiguous,[7/] in that question 3(b)

7/ The Commission recognized that questions 3(a) and (b) in Section III of the application were of an ambiguous nature. "In interpreting an administrative regulation, a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt." Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413-414; Accord, Boesche v. Udall, 112 U.S. App. D.C. 344, 303 F.2d 204, cert. granted, 371 U.S. 886. Furthermore, the (cont'd)

(the name of the bank) assumes that the amount described in 3a (funds on deposit) is deposited in a bank, taken together with the absence of any motive to mislead, was persuasive that Farina was not guilty of a misrepresentation (R. 2330). This was clearly a permissible conclusion.[8/]

First of all, the record is barren of any motive for the claimed misrepresentation. The purpose of the questions on the form is to enable the Commission to determine whether an applicant is financially qualified, i.e., does he have available the funds necessary to construct and commence operation of the proposed station. Appellant, Burlington Broadcasting, suggests no motive, other than that keeping the money in cash was obviously bizarre conduct which Farina presumably wished to conceal from the Commission (Br. 14-15). But this view is unsupported by any demonstration that maintaining a large sum in cash at home is actually so peculiar. Both the examiner and the Commission found (R. 2288, 2317) that Farina was financially qualified and that he had the money he said he had. The Commission properly found that there was no reason to suspect Farina's motives

7/ (cont'd) Commission's construction of its own rules, while perhaps not controlling, is of value in an interpretation of them. Plains Television Corporation v. Federal Communications Commission, 108 U.S. App. D.C. 20, 278 F.2d 854; cf. Interstate Broadcasting Company v. Federal Communications Commission, 105 U.S. App. D.C. 224, 265 F.2d 598.

8/ In Southwest Broadcasting Company, 5 F.C.C. 616, the Commission held that where a corporation borrowed a large sum of money and deposited it in a bank, listed such deposit in its application and subsequently withdrew the money to repay the loan, no inference of bad faith could be drawn, since the corporation had the money in question available to it at all times although, it was not actually on deposit in the bank. On this principle, no inference of mala fides can be attributed to Farina, for Farina at all times had $54,000 available to him.

in responding to the application form questions.

Furthermore, the record contains ample evidence of a reasonable background and explanation for the answers Farina gave. He was a frugal person whose ambition of owning a broadcast station was strongly assisted by his parents (Tr. 2100-2106). He amassed the money over a 20 year period, and kept it in his parents' home in deference to his family's wishes (Tr. 2100-2106, 2115-2120, 2129-2130). He testified that he assumed the question on the form as to amount of money "on deposit in bank or other depository" generally meant the amount of cash he had (Tr. 2129-2130).

This was indeed a reasonable response to a question which is directed to the amount of funds on hand, and which covers funds in a bank "or other depository." That the question may have been misinterpreted by Farina does not warrant a finding of deliberate misrepresentation when the possibility of misinterpretation, as the Commission itself recognized, is inherent in the broad language of the question. The question may have been drafted with only a bank in mind, but it is not in terms so obviously limited to that one form of "depository" that the possibility of confusion is incredible. And, of course, once the first question was read as it was by Farina, he properly gave the name of the bank in which he had that portion of the money which was in a bank, since the next questions referred only to money in a bank. 9/

9/ Appellant's contentions that Farina's representations were willful and deliberate are unsupported by any specific evidence. The fact that Farina is no neophyte in the preparation of broadcast applications does not in any manner support appellant's position (cont'd)

The issue is not complicated and need not be belabored. Appellant has failed to show that the Commission's decision is not based upon substantial evidence in the record as a whole, Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474,[10/] or that it is not a reasoned judgment, on that evidence, McKenney v. Federal Communications Commission, __ U.S. App. D.C. __, 324 F.2d 444; Kidd v. Federal Communications Commission, 112 U.S. App. D.C. 288, 289, 302 F.2d 873, 874, stating:

> "With questions of the present sort, centering on the character of an applicant, our function is primarily to see whether the Commission's judgment, based on the record as a whole, is reasonable and within its proper discretion. Cf. Federal Communications Commission v. WOKO, Inc., 329 U.S. 223, 229, 67 S. Ct. 213, 91 L. Ed. 204 (1946). Here, the Commission considered and adequately dealt with the major contentions advanced by appellant. Within fairly broad limits, the relative weight to be given to all the relevant factors presented must lie in the sound discretion of the Commission. On the basis of the record before us, we think that the Commission acted reasonably and within its discretion in finding Poor [the intervenor] to be qualified."

9/ (cont'd) (App. Br. 14). Nor does the fact that Farina had not corrected these answers on subsequent review. Laboring under the misconception that "other depository" as used in question 3(b) of Section III included the family receptacle, it would logically follow that no reason would exist for Farina to modify his answers since he believed his original responses to be correct (Tr. 2129-2130).

10/ Appellant's reliance on the principle of Hall v. Federal Communications Commission, 99 U.S. App. D.C. 86, 237 F.2d 567, is misplaced. In that case an affirmative misrepresentation was made by the intervenor when it assured the Commission that its intention was to locate its permanent transmitter at a specific location when in fact, there was no such fixed intention, but rather complete indecision whether or not it would do so.

II. THE COMMISSION PROPERLY CONCLUDED FROM THE RECORD AS A WHOLE THAT FARINA WAS ENTITLED TO A PREFERENCE OVER APPELLANT IN THE AREA OF PREPARATION AND PLANNING.

The Commission properly concluded that the extent of Farina's contacts with local residents and his use of these contacts in preparing his program proposals, demonstrated his superiority in the area of preparation and planning (R. 2325). Farina contacted 151 people during the preparation of his application in order to ascertain the program needs of the area he proposed to serve (R. 717-735, 2320). Appellant Burlington Broadcasting, on the other hand, had no appreciable local contacts prior to filing its application, and based its program proposal primarily upon its experience in operating station WCOJ, in Coatesville, Pennsylvania (R. 2320-2321). While it made some contacts in the Burlington area, these contacts were not particularly related to its proposed programming (R. 2325). Appellant does not argue that on a comparative basis it was superior to Farina, but confines its argument (Br. 16-20) to the contention that four persons testified that they had no recollection of having been introduced to Farina, or having discussed his program proposals with him. The Commission however, did not believe that this testimony seriously detracted from the validity of Farina's general showing, and further concluded that the record supported the conclusion that Farina did in fact talk to these four people (R. 2320).

We believe the Commission's conclusions were justified by the

record before it.[11] Farina made detailed historical and statistical studies of the Burlington-Mt. Holly area by consulting historical publications and other research materials (Tr. 2008-2009). Conferences were held with Dr. Henry Bisbee, the Burlington County (geographical subdivision) historian, to discuss proposed program plans and to obtain a representative list of persons and organizations which might aid and assist Farina to determine the program needs of the area (Tr. 2419-2426). On the basis of this information, inter alia, Farina devised a question form which he utilized in making contacts with representative citizens of the area. This form requested information as to the individual's opinion concerning the program needs of the area, how he felt they were not presently being satisfied, and how he believed a first local station could meet these needs (R. 1229, Tr. 2053, 2427-2428).

Farina drafted a proposed program schedule utilizing the responses to this questionnaire and other material derived from personal knowledge and information (Tr. 2041-2042, 2065-2071). And, the hearing examiner specifically found that Farina's educational, agricultural, discussion, talk, and religious programs were based upon his extensive discussions with prominent citizens in these fields residing within Farina's proposed coverage area (R. 2274-2276).

11/ Appellant has not disputed the validity and reliability of the other 147 contacts made by Farina. Appellant takes issue only with the Commission's finding as to the following four persons: Amos Hope, President of the Burlington Lions Club; Nils Johnson, Secretary of the Burnt Cork Association; Mary Symonds, President of the Burlington County Tuberculosis League; and Clarence Marshall, Secretary of the Mt. Holly Elks Club.

The examiner further expressed doubt, however, as to the conclusiveness and reliability of the contacts Farina made, because of the testimony of four witnesses out of the over 150 interviewed to the effect that Farina had not spoken to them (R. 2273-2274). Appellant's argument is premised on the examiner's conclusion in this area.[12/] The Commission did not agree with the examiner's evaluation of the testimony. The Commission found (R. 2320) that the record supported the conclusion that Farina had made the disputed contacts with Amos Hope, Nils Johnson, Clarence Marshall and Mary Symonds.

Dr. and Mrs. Henry Bisbee, leading Mt. Holly citizens who assisted Farina in making his program contacts, and who had no financial or ownership interest whatsoever in this proceeding (Tr. 2419, 2476), affirmatively corroborated Farina's testimony with respect to Hope and Johnson, and a call to the office of Miss Symonds. (R. 2320-2321, Tr. 2431-2440, 2479-2481). Dr. Bisbee had called Hope and introduced him to Farina by telephone; furthermore, he listened to the conversation as the two parties discussed Farina's program proposals (Tr. 2432-2434). Dr. Bisbee also stated that there was a great possibility that he had introduced Farina to Hope at a joint service club meeting (Tr. 2433). Dr. Bisbee testified that he

---

12/ The hearing examiner concluded (R. 2301):
"* * * *A weakness in the Farina endeavor is displayed by the controverted testimony of four witnesses, namely, Amos Hope, Clarence Marshall, Nils Johnson and Miss Mary A. Symonds, all long-time and prominent citizens of the Burlington-Mt. Holly area. These witnesses all categorically disputed Farina's testimony that he had contacted them respecting his proposal at Mt. Holly. At least three of the four witnesses labeled as false the representations made by Farina that they had been interviewed respecting his proposed station."

assisted Farina in placing a call to a representative of the Burnt Cork Association, a charitable group, although he did not recall whether Nils Johnson, an official of this group, was the party contacted (Tr. 2439). Lastly, the doctor stated that Farina phoned the Mt. Holly Elks Club, of which Clarence Marshall was an official, and spoke to a representative of the organization, but he did not remember who this person was (Tr. 2440).

Mrs. Bisbee, who is also the doctor's secretary (Tr. 2475), specifically remembered placing the call to Hope who was then introduced to Farina by the doctor (Tr. 2479-2480). Similarly, Mrs. Bisbee recalled dialing the Burnt Cork Association office, contacting a Mr. Johnson, and then handing the receiver to Farina (Tr. 2480). She placed a call to Mary Symond's office at the Tuberculosis League in the same manner, and Farina then spoke to a representative of that organization (Tr. 2481).

The Commission also noted that the contacts had occurred in 1959, and that the testimony was given on November of 1961. It took account (R. 2320) of the fact that Hope and Johnson conceded that a conversation with Farina, now forgotten, might have taken place. Furthermore, it granted exceptions (Nos. 50-57) of Farina, which pointed out possible grounds for bias on the part of the four witnesses (R. 2330), a matter of which the examiner had taken no cognizance.[13/]

13/ Hope was an acquaintance of two of Burlington County's principals (Tr. 2370-2371), and Johnson had business dealings with (cont'd)

In these circumstances, the Commission could reach its own different conclusion upon the whole record. Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474. As this Court stated in Tampa Times Company v. Federal Communications Commission, 97 U.S. App. D.C. 256, 259, 230 F.2d 224, 227:

> "The Congress conferred upon the Commission the task and the responsibility of evaluating comparative claims of mutually exclusive applicants. So long as it observes all procedural requirements, considers the issues, reaches reasoned conclusions, and renders reasoned judgment, courts cannot superimpose their opinions upon these matters."

In light of the foregoing testimony, the Commission's conclusion that the record supports the finding that Farina actually

---

13/ (cont'd) one of Burlington County's principals (Tr. 2400), and was a neighbor of another for 20 years (Tr. 2401). Both acknowledged on cross examination that it was possible that a conversation with Farina could have taken place (Tr. 2361-2363, 2401-2403). Hope also conceded the possibility that an introduction to Farina might have occurred at a local service organization meeting (Tr. 2362).

Clarence Marshall, an executive of the Mt. Holly Elks Club, also testified that he was called to the hearing at the request of G. Howard Sleeper, President of Burlington County, and that he was cognizant of the fact that Burlington County had a substantial interest in this proceeding. Marshall had been an employee of Sleeper's for 16 years (Tr. 2387-2388). Miss Mary Symonds, an official of the local Tuberculosis League, stated that she had known Sleeper for many years, and at various times had sought publicity for her organization through Sleeper's newspaper publications (Tr. 2410-2411).

talked to the four witnesses is amply supported. To the extent that the examiner (R. 2272) found that "a cloud" had been cast upon some of the contacts, he did not indicate why he did not believe Farina, nor did he consider the possible effect upon their testimony of the connections of the four witnesses with one of the parties. His findings, furthermore, were not based upon the demeanor of the various witnesses. See also Johnston Broadcasting Co. v. Federal Communications Commission, 85 U.S. App. D.C. 40, 175 F.2d 351; Scripps-Howard Radio, Inc., v. Federal Communications Commission, 89 U.S. App. D.C. 13, 189 F.2d 677, cert. den. 342 U.S. 830.

III. THE COMMISSION PROPERLY EVALUATED FARINA'S QUALIFICATIONS IN THE AREA OF BROADCAST EXPERIENCE. ITS CONCLUSION THAT FARINA'S EXPERIENCE SHOULD AID HIM IN DEVELOPING PROGRAMMING FOR HIS OWN STATION IS FULLY SUPPORTED BY THE RECORD.

The Commission accorded appellant a distinct preference in the area of broadcast experience (R. 2322). Appellant contends (Br. 20-22) that the Commission "watered down" the superiority accorded it by relying upon Farina's experience as a production assistant in NBC's program division. Specifically, appellant disputes the Commission's conclusion that Farina was not devoid of experience in broadcasting, "for his years spent in NBC's program division, as a 'Qualified Production Assistant' should stand him in good stead in developing programming for his station" (R. 2325). Ample evidence may be found in the record to support this conclusion.

Farina's interest in radio broadcasting originated during his high school years when he participated in a number of broadcasts over local Newark radio stations (R. 2270, Tr. 2020-2022). His education at New York University consisted of a major in economics, with a minor in radio broadcasting (Tr. 2013). In addition, he participated fully in the college radio club where he studied news-writing, direction, announcing, and sales presentation (Tr. 2014).

Farina completed his college courses while employed by the National Broadcasting Company (NBC) in New York City (Tr. 2012).[14/]

14/ Farina was employed by the National Broadcasting Company in New York City from 1947 to September 1, 1961, when he resigned in order to devote his full time to prosecuting his application in this proceeding (R. 2271).

At NBC, Farina worked part of his working day in a warehouse where he did "almost everything" (Tr. 2184), and at different times was responsible for the carpentry shop, the prop securing area and the drapery section (Tr. 2184). He also was an assistant supervisor of the television facilities department where he exercised control over carpenters, painters, and scenic artists (Tr. 2185). Based on his previous background and the quality of his work, Farina held the title of "Qualified Production Assistant" with NBC from 1959 onward (R. 2271).[15/]

During his employment at NBC, Farina also completed courses in radio program production taught by the network staff, and enrolled in other network sponsored courses on camera work, direction, and related subjects (R. 2271, Tr. 2014-2015, 2185). Besides these basic courses, Farina was enrolled in an announcing class at NBC, under the supervision of Pat Kelly, the chief network announcer at the time. Farina took three courses, each of which exceeded two months duration (R. 2271, Tr. 2014).[16/]

15/ Appellant attempted to elicit a reply from Farina that, in effect, his work at NBC consisted of nothing more than menial tasks (Tr. 2184). Farina unequivocally denied this suggestion, and appellant did not adduce any evidence on this point to contradict Farina's testimony.

16/ For a period of 15 years Farina also visited numerous radio stations and made an intensive study of their operations for the purpose of obtaining as broad a knowledge as possible about the industry and, in particular, the service being rendered to the Mt. Holly-Burlington area (R. 2271, 2203-2204). Farina voluntarily rendered his services to the Newark Board of Education's educational FM station in 1948, by producing book reviews, discussions, and dramatic shows. This preparation of educational programming lasted over 8 months (R. 2271, Tr. 2014).

The record thus shows that Farina has had a varied broadcast experience which the Commission could properly consider. It also shows, contrary to appellant's argument, that Farina had experience and training at NBC which will be useful to him. The Commission properly preferred appellant on this factor, but it also properly stated that Farina's NBC experience would stand him in good stead.

CONCLUSION

For the foregoing reasons, the decision of the Commission should be affirmed.

Respectfully submitted,

MAX D. PAGLIN
General Counsel

DANIEL R. OHLBAUM
Associate General Counsel

HOWARD JAY BRAUN
Counsel

Federal Communications Commission
Washington, D.C. 20554

January 20, 1964.

BRIEF FOR INTERVENOR

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,988

WILLIAM S. HALPERN & LOUIS N. SELTZER
d/b as BURLINGTON BROADCASTING CO.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

MOUNT HOLLY-
BURLINGTON BROADCASTING COMPANY, INC.,

Intervenor.

On Appeal from Decision and Order
of the Federal Communications Commission

BENITO GAGUINE

HERBERT M. SCHULKIND

1612 K Street, N.W.
Washington, D. C. 20006

Attorneys for Intervenor

QUESTIONS PRESENTED

The stipulation of the parties with respect to the questions presented is correctly set out on page (i) of appellant's brief.

INDEX

TABLE OF AUTHORITIES

Cases:

ADMINISTRATIVE DECISIONS

STATUTES

---

* Cases primarily relied upon.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,988

WILLIAM S. HALPERN & LOUIS N. SELTZER,
d/b as BURLINGTON BROADCASTING CO.

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION

Appellee,

MOUNT HOLLY-
BURLINGTON BROADCASTING COMPANY, INC.,

Intervenor.

On Appeal from Decision and Order
of the Federal Communications Commission

BRIEF FOR INTERVENOR

COUNTERSTATEMENT OF THE CASE

This is an appeal from a Decision and Order of the Federal Communications Commission, adopted June 12, 1963, and released June 14, 1963 (R. 2316-2332), granting the application of John J. Farina, tr/as

Mt. Holly-Burlington Broadcasting Company (Farina)[1] for a construction permit for a new standard broadcast station to operate on 1460 kc with power of 5 kw, daytime-only, in Mount Holly, New Jersey, and denying the mutually-exclusive applications of appellant William S. Halpern and Louis N. Seltzer, d/b as Burlington Broadcasting Co. (Burlington Broadcasting) and of Burlington County Broadcasting Company (Burlington County) for similar facilities in Burlington, New Jersey and Mount Holly, New Jersey, respectively. Burlington County has not appealed from this action.

The above-mentioned applications were designated for consolidated hearing by Order released February 7, 1961 (R. 183-188). The Commission found that, except as indicated by specified issues, each applicant was legally, financially, technically and otherwise qualified (R. 183).

On June 12, 1961, appellant filed a petition requesting the addition of an issue as to whether Farina was financially qualified (R. 2693-2703).[2] In a Memorandum Opinion and Order released September 29, 1961, the Commission amended its prior order of designation as requested by appellant (R. 295-296). The issues pertinent to this appeal were as follows (R. 183-188, 295-296):

---

[1] John J. Farina, tr/as Mt. Holly-Burlington Broadcasting Company, filed a Notice of Intention to Intervene in this proceeding on July 19, 1963. On December 2, 1963, Farina filed a Motion requesting that Mount Holly-Burlington Broadcasting Company, Inc. be substituted as intervenor in his stead. The Motion pointed out that, on November 27, 1963, pursuant to prior consent to the Federal Communications Commission, Farina assigned all right and interest in the construction permit to Mount Holly-Burlington Broadcasting Company, Inc., a corporation wholly owned by Farina except for single qualifying shares held by two members of his family. By Order of December 19, 1963, the Court granted the aforesaid Motion and directed the Clerk to make a notation of the change of name of intervenor to Mount Holly-Burlington Broadcasting Company, Inc., in the files and records of the Court.

[2] Appellant also sought the addition of an issue as to whether Farina was the real party in interest and whether other parties had an undisclosed interest in his application (R. 2693-2703). This issue was added by the Commission but was resolved in Farina's favor both by the Examiner and the Commission, and is not involved in this appeal (R. 2298, 2317).

"9. To determine, in the event it is concluded that a choice between the instant applications cannot be made on considerations relating to Section 307(b), which of the operations proposed in the above-captioned applications would best serve the public interest in the light of the evidence adduced pursuant to the foregoing issues and the record made with respect to the significant differences between the applicants as to:

a) The background and experience of each having a bearing on the applicant's ability to own and operate the proposed station.

b) The proposals of each of the instant applicants with respect to the management and operation of the proposed station.

c) The programming service proposed in each of the instant applications.

"12. To determine whether John J. Farina, tr/as Mt. Holly-Burlington Broadcasting Company, is financially qualified to construct and operate the station for which he seeks a construction permit in this proceeding.

"13. To determine, in the light of the evidence adduced pursuant to the foregoing issues which, if any, of the instant applications should be granted."

Hearings were held commencing on July 12, 1961, and the record was closed on December 6, 1961 (Tr. 103, 2917).[3] Following the filing of proposed findings and conclusions, the hearing examiner released an Initial Decision on May 2, 1962, looking toward a grant to Burlington County and a denial of the applications of Farina and appellant (R. 2239-2306).

In Farina's application filed on February 26, 1960, the following responses were given to the questions listed in Section III with respect to proposed financing (R. 2343):

---

[3] The "Tr." prefix to a record reference refers to the pagination of the hearing transcript in the record filed with the Court. The transcript pages have not been renumbered in the record.

"1.c. The proposed construction is to be financed and paid for in the following manner (including specified statements as to the approximate amount to be met and paid from each source). The financial plan should provide for any additional construction costs should the actual cost exceed the original estimated cost, and also for the early operation of the station in the event operating expenses should exceed operating revenues:

Existing Capital	New Capital	Loans from banks or others	Profits existing operations
'In excess of $54,000'	'--'	'--'	'--'

Donations	Credit, deferred payments, etc.	Other sources (specify)
'--'	'$36,000.'	'--'

* * * * * *

"3. Furnish the following information with respect to the applicant only. If the answer in 'None' to any or all items, specifically so state:

"a. Amount of funds on deposit in bank or other depository

'In excess of $54,000'

"b. Name and address of the bank in which deposited

'Fidelity Union Trust, Newark, N. J.'

"c. Name and address of the party in whose name the money is deposited

'John J. Farina, 321 Summer Avenue, Newark, N. J.'

"d. Conditions of deposit (in trust, savings, subject to check, on time deposit, who may draw on account and for what purpose, or other condition)

'Savings and checking accounts may be drawn upon by John J. Farina for any purpose'

"e. Whether the funds were deposited for the specific purpose of constructing and operating the station

'No.'"

Submitted with Farina's application as Exhibit 2 was the following "Plan of Financing" (R. 2352):

"The total initial cash requirements of the station proposed herein may be summarized as follows:

Down payment to RCA on equipment (see attached letter of credit)	$12,200.
First year's rental on studios and transmitter site	4,900.
Remodelling and constructing buildings	4,000.
Miscellaneous, contingencies, fees, furniture and fixtures, etc.	12,000.
Three months' operating expenses	20,000.
	$53,100.

"To meet the above cash requirements, Mr. Farina has cash on hand in excess of $54,000 (See Section III, Paragraph 3). He has no liabilities. It is clear, therefore, that he is fully qualified to construct and operate the proposed broadcast facility.

"Mr. Farina had a net income after federal taxes in excess of $5,000 during each of the past two years."

In an amendment to his application dated August 30, 1960, Farina submitted the following "Revised Plan of Financing (R. 2412):

"By this amendment, Mt. Holly-Burlington Broadcasting Company is making certain changes in its financial proposal. Under the revised proposal, the estimated costs of construction of the station will amount to $79,818. Thus, assuming that the applicant purchases his equipment for cash, the initial cash requirements of the proposal may be summarized as follows:

"(1) Total construction costs	$ 79,818
"(2) Initial operating capital (three months)	23,000
"(3) Total	$102,818

"To meet the above requirements, the applicant will have available liquid resources in excess of $104,000, as follows:

"(1) Cash on hand in excess of $54,000 (see original application).
"(2) Loan from Burlington Bank & Trust Company (see attached letter of credit) $50,000.

"Since the applicant's cash resources exceed the initial requirements of his proposal, it is evident that he is qualified financially to construct and operate initially the proposed Mt. Holly station."

The hearing examiner found that Farina was financially qualified (R. 2287-2290). However, the examiner added that "while Farina has $53,000.00 in cash or the equivalent in bonds and a line of credit from a Burlington, New Jersey, bank in the sum of $50,000.00, totalling $103,000.00, this applicant never at any time, as he represented to the Commission in his application, had $54,000.00 on deposit in a Newark, New Jersey, bank in 1960, or at any other bank" (R.2290).

The examiner further stated that although "in his application filed February 26, 1960, Farina represented to the Commission that he had in excess of $54,000 on deposit with the Fidelity Mutual (sic) Trust Company of Newark, New Jersey . . . Farina did not have $54,000 on deposit with the Fidelity Mutual Trust or any other bank" (R. 2297). However, the examiner found that "it is evident that [Farina] possessed funds in excess of $53,000.00" at the time he filed his application, such funds being "deposited in the family receptacle in his parents' home in Newark" (R. 2289).

The examiner noted that Farina "is a single man and is a thrifty individual of rather abstentious habits, who neither drinks nor smokes, nor squanders his earnings;" and that "through his parents' benevolences he has lived at home without paying board or room, thereby making it possible for him to save substantially all of his earnings over a period of years" (R. 2288). The examiner found that "as a youth Farina had expressed a desire to enter the broadcasting field, thus saving his money

toward that objective"; and that "Farina's parents were anxious for their son to achieve his ambition and permitted him to live at home without paying room and board or making other contributions to the family's expenses from his high school days" (R. 2288). The Examiner further found that Farina's "parents are apprehensive about placing their savings in banks and have a family cash receptacle in their home for their savings"; that "over the years various members of the immediate family had deposited money in a common fund at the parental home", and that, "since 1950 it has been expressly agreed between Farina and his parents that the funds deposited in the family receptacle in his parents' home in Newark were to be his for use in establishing a radio station" (R. 2288-2289).

The examiner found that when, "in June, 1961, Farina's finances were challenged in this proceeding [by appellant] . . . he immediately withdrew $53,000.00 from the receptacle at the family home and delivered the sum to his attorney's office in New York City"; and that "this money was promptly taken to the Hanover Bank in New York and converted into U.S. Treasury Bonds (R. 2289-2290).[4]

The examiner did not disqualify Farina, but proceeded to a comparative evaluation of the applicants. Appellant was accorded a preference on the criterion of broadcast experience, Farina's experience being characterized by the examiner as "minimal, regardless of his years of interest in radio work" (R. 2299-2300). Farina was preferred over both appellant and Burlington County on integration of ownership with management (R. 2302); and Burlington County received a preference on

---

[4] Prior to the filing of his application in February 1960, Farina determined that the amount of cash he had on hand in the receptacle in his family home was in excess of $54,000 (Tr. 2119). When his finances were challenged by appellant in June 1961, Farina computed the savings he had added to the fund since the filing of the application and the money he had expended in connection with his application in the intervening period, and determined that he had in excess of $53,000 cash on hand (Tr. 2131-2132). He withdrew $53,000 in cash from the family receptacle and deposited this amount with his attorney in New York City on the day following the filing of appellant's pleading challenging his finances (R. 2289, Tr. 2134-2138).

the factor of civic participation (R. 2299). No preference was given in the areas of preparation and planning or proposed programming (R. 2300-2301). With respect to Farina's showing on these factors, the examiner noted:

> "Farina made up his own programming after numerous contacts and visits in the area. He had studied programming and visited radio stations over a long period of time and had his own conception as to what a program for a community such as the one here involved should be. He had made up a program format for a proposal at Toms River, New Jersey, and he admitted that there was a substantial degree of similarity to the program submitted with the Toms River application to the one here involved. A weakness in the Farina endeavor is displayed by the controverted testimony of four witnesses, namely, Amos Hope, Clarence Marshall, Nils Johnson and Miss Mary A. Symonds, all long-time and prominent citizens of the Burlington-Mount Holly area. These witnesses all categorically disputed Farina's testimony that he had contacted them respecting his proposal at Mount Holly. At least three of the four witnesses labeled as false the representations made by Farina that they had been interviewed respecting his proposed station" (R. 2301).

Although the examiner made findings on the comparative criteria as to all three applicants, he concluded that "a grant of a first broadcast facility to Mount Holly, rather than Burlington, would provide a more fair, efficient and equitable assignment as contemplated by Section 307(b) of the Communications Act of 1934, as amended [47 U.S.C. 307(b)]" (R. 2305). The examiner thereupon preferred Burlington County (R. 2306).

Farina filed timely exceptions to the examiner's initial decision (R. 3080-3133). Exceptions were also filed by appellant and the Broadcast Bureau (R. 1575-1591, 1592-1632). The Commission heard oral argument en banc on April 11, 1963 (Tr. 2198-2261); and on June 14, 1963, released a Decision granting Farina and denying appellant and Burlington County (R. 2316-2332). The Commission generally adopted the examiner's findings of fact, with certain modifications, but noted that it "views those

findings as warranting substantially different conclusions on several major issues, and a different ultimate result . . ." (R. 2317).

The Commission affirmed the examiner's conclusion that Farina is financially qualified (R. 2317). However, the Commission disagreed with the examiner's view that the 307(b) allocation issue was determinative as between Mt. Holly and Burlington, and therefore the Commission turned to an evaluation of the three applicants on the comparative criteria (R. 2319).

Burlington County was given a preference on area familiarity in view of the local residence of its principals, but no distinction was drawn between Farina and appellant on this factor (R. 2324). As the only applicant whose principals had owned and operated a broadcast station, appellant received a first preference on broadcast experience; however, Farina's experience was deemed superior to that of Burlington County (R. 2324). Farina's 100% integration of management was judged superior to the full-time integration of a 50% partner of appellant and to the integration of several of Burlington County's minority stockholders (R. 2324-2325). Farina was awarded a preference on the criteria of preparation and planning and programming because of "the extensiveness of his contacts and for relating them to his program proposals, which he designed himself" (R. 2320-2321, 2325). The Commission stated that:

> ". . . [T]he demonstrated connection between Farina's contacts and his programming suggests that his planning and preparation have been superior and that he has demonstrated a greater likelihood, through good planning, that his proposal will be effectuated" (R. 2321).

The Commission noted that "only Farina's preparation was reflected in his program proposal", and that "aside from culling a few statistics regarding the Burlington area, Halpern and Seltzer acquired no familiarity therewith until after the applications had been designated for hearing and

the program proposal frozen" (R. 2321). Finally, the Commission preferred Farina on the factor of diversification of control of mass communications media, since he is "the only applicant not identified with other mass communications media" (R. 2324, 2325).

With respect to the examiner's statement that a "cloud . . . is cast upon some of [Farina's] contacts" in the light of the testimony of the four individuals that they have not been contacted by Farina, the Commission found as follows (R. 2320-2321):[5]

> "Farina listed 151 persons whom he had contacted in the preparation of his application. That an opposing applicant was able to present four of the named individuals to testify that they had no recollection of having met or talked with Farina does not seriously detract from the validity of the remaining 147 contacts. Moreover, the record as a whole supports the conclusion that Farina did in fact talk to the four named individuals. Thus, while two persons — Amos Hope and Nils Johnson — testified that they do not remember talking to Farina, they conceded that such a conversation might have taken place. Additionally, Dr. and Mrs. Bisbee, Mount Holly residents who assisted Farina in making local contacts, specifically testified as to their having placed calls for Farina from their home to Hope and Johnson, and Mrs. Bisbee recalled calling the office of Miss Symonds, although she did not know the name of the woman with whom Farina spoke there. Miss Symonds and Clarence Marshall, the latter a Sleeper employee for 16 years, both denied having ever spoken with Farina. It must not be overlooked that the contacts in question occurred in 1959, and the testimony with respect thereto was received in November

---

5 With respect to the examiner's deprecation of Farina's contacts made in the vicinity of Toms River, the Commission stated (R. 2320):

> "Toms River is 30 miles from Mount Holly and lies within Farina's proposed interference-free contour. Thus, contacts in the Toms River area, even though made with another proposal in mind, would be of use in acquainting Farina with the needs of his service area. Moreover, it is to be noted that a regional channel is involved here, and contacts limited to the principal community may well be an inadequate basis for designing programs to meet area-wide needs."

1961. Also, Farina's purpose in making the contacts was to familiarize himself with the community and to determine its needs and desires, a goal capable of being realized without mention of his own name or of his intent to seek a radio station, and it is hardly surprising that some of those contacted may have been unable to recall the event over two years later."

With respect to the examiner's findings and conclusions relating to the financial representations in Farina's application, the Commission stated (R. 2330):[6]

"Findings 104, 106 and 110 are corrected to show that Farina represented in his application, in response to Item 3a of Section III, that he had 'In excess of $54,000' 'on deposit in [a] bank or other depository', and that, to the extent that it was on deposit in a bank (Item 3b), as distinguished from other depositories, it was in 'Fidelity Union Trust, Newark, N. J.' In fact, he had a small sum in Fidelity Union Trust, and more than $53,000 in a cache in his parents' home. The somewhat ambiguous nature of questions 3a and b of Section III of the application (in that question 3b assumes that the amount described in 3a is deposited in a bank), combined with the total absence of any motive or evidence of intent to mislead the Commission, persuades us that Farina was not guilty of a misrepresentation."

The Commission summarized its evaluation of the applicants on the comparative criteria, as follows (R. 2325):

"Thus, Farina has been preferred for preparation, planning, and programming; integration; and diversification. County has won a preference for its area familiarity, and Halpern-Seltzer, for broadcast experience. While Farina lacks area familiarity, as defined in paragraph 21, supra, his extensive contacts and planning indicate more than the typical non-resident's awareness of community needs. Neither is he devoid of experience in broadcasting, for his years spent in NBC's program division as a 'Qualified Production Assistant', should stand him in good stead in developing programming for his own station. Thus, Farina has offered abundant

---

[6] The Commission's comments are set forth in the Appendix to its Decision in connection with its granting of Farina's Exceptions Nos. 59, 60, 67-71 (R. 2330).

> assurance in several criteria, and adequate assurance in each of the others, that a program proposal serving the public interest will be effectuated, and that he may be expected to operate throughout his license term in the public interest. On the other hand, both County and Halpern-Seltzer have shown weaknesses with respect to one or more of the criteria. The former's lack of experience and the latter's lack of area familiarity have not been compensated by showings under other factors. County offers only area familiarity and partial integration, unreinforced with a strong showing of preparation to compensate for lack of experience. Similarly, Halpern-Seltzer did little to cure their lack of familiarity with the area to be served and offer us only an experienced broadcaster (with a 'satisfactory' record) and partial integration."

In light of its foregoing views as to the merits of the applicants on the comparative factors, the Commission thereupon determined that a grant to Farina would best serve the public interest (R. 2326).

SUMMARY OF ARGUMENT

1. The Commission properly concluded that Farina was not guilty of misrepresenting his finances. In the first place, Farina had all of the funds on hand which he said he had, and there is no question that he is financially qualified. In stating in response to Item 3(a) of Section III of the application form, which calls for the "amount of funds in bank or other depository", that he had "in excess of $54,000", Farina did not mean to imply that all of this sum was in the bank. Similarly, in stating in response to Items 3(b)-(e) that he had savings and checking accounts at the Fidelity Union Trust of Newark, N. J., Farina did not mean to imply that these accounts, which he in fact did have, contained all of the $54,000. The apparent misconception that the bulk of Farina's $54,000 was on deposit in a bank rather than in a receptacle in his parents' home, stemmed from the ambiguous nature of the form itself. The record is barren of any evidence to indicate that Farina intended to mislead the Commission or to withhold from it the fact that his $54,000 sum was retained in the receptacle in his parents' home. Nor does the record show

any ulterior motive for Farina's withholding these facts from the Commission. The Commission's findings and conclusions in this respect are based on substantial evidence and should not be overturned.

2. The Commission properly accorded Farina a preference on the factor of planning and preparation. Of the applicants, only Farina's efforts in this area were reflected in the program proposal. Moreover, appellant has not challenged the Commission's findings and conclusions establishing serious deficiencies in its own planning and preparation.

The fact that 4 of the 151 persons listed as having been contacted by Farina testified that they have no present recollection of having been so contacted does not seriously detract from the basic validity of Farina's overall showing in this respect. In any event, the Commission properly concluded from the record as a whole that Farina did in fact talk to the four persons who have disputed his contacts. A careful examination of the testimony of these witnesses establishes that the Commission's conclusion is based on substantial evidence.

3. The Commission properly evaluated Farina's broadcast experience. The record supports the Commission's conclusion that, while his experience is not as extensive as that of appellant, Farina is not totally devoid of experience, and that his background in broadcasting will be of assistance to him in operating his station. The detailed evidence of record with respect to Farina's background and experience clearly constitutes substantial evidence in support of the Commission's conclusion.

ARGUMENT

I

THE COMMISSION PROPERLY CONCLUDED THAT FARINA DID NOT MISREPRESENT HIS FINANCES

Appellant contends (Br. 8-15) that the Commission improperly concluded that Farina was not guilty of misrepresenting his financial

qualifications as detailed in his application. The record, however, fully supports the Commission's conclusion.

Appellant does not challenge the Commission's finding that Farina possessed the amount of funds he indicated he had in his application. Nor does appellant take issue with the Commission's conclusion that Farina is financially qualified. Rather, appellant maintains that the Commission must hold that Farina falsely represented that the "in excess of $54,000" he had was on deposit in a named bank instead of advising the Agency that the bulk of these funds were kept in a receptacle in his parents' home. The question before the Court is whether the Commission's conclusion that "Farina was not guilty of a misrepresentation" (R. 2330) is based on substantial evidence, Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474.

Farina stated in Item 1(c) of Section III of his application, that his station would be financed by "Existing Capital" amounting to "In excess of $54,000" and by "Credit, deferred payments, etc." of $36,600." In response to Item 3(a), which calls for the "Amount of funds on deposit in bank or other depository", Farina stated -- "In excess of $54,000". Then, in response to Item 3(b), which asks for the "Name and address of the bank in which deposited", Farina stated -- "Fidelity Union Trust, Newark, N. J." Farina indicated in Item 3(c) that the "Name and address of the party in whose name the money is deposited" was "John J. Farina, 321 Summer Avenue, Newark, N. J." In Item 3(d), which asks for the "Conditions of deposit (in trust, savings, subject to check, on time deposit) who may draw on account and for what purpose", Farina stated -- "Savings and checking accounts may be drawn upon by John J. Farina for any purpose". Finally, in answer to Item 3(e), as to "Whether the funds were deposited for the specific purpose of constructing and operating the station", Farina answered -- "No" (R. 2343).

The examiner concluded from the foregoing that Farina had misrepresented "that he had $54,000 on deposit in the Fidelity Mutual (sic) Trust of Newark, New Jersey" (R. 2298). The Commission disagreed.

Noting "the somewhat ambiguous nature of questions 3a and b of Section III of the application (in that question 3b assumes that the amount described in 3a is deposited in a bank)", the Commission corrected the examiner's findings to show that Farina had not represented that all of his funds were in the bank; but that (R. 2330):

> "Farina represented in his application, in response to Item 3a of Section III, that he had 'In excess of $54,000' 'on deposit in [a] bank or other depository', and that, to the extent that it was on deposit in a bank (Item 3b), as distinguished from other depositories, it was in 'Fidelity Union Trust, Newark, N. J.'."

The Commission pointed out that "in fact [Farina] had a small sum in Fidelity Union Trust, and more than $53,000 in a cache in his parents' home." Finally, the Commission stated that the ambiguity in the application form noted above, "combined with the total absence of any motive or evidence of intent to mislead the Commission, persuades us that Farina was not guilty of a misrepresentation" (R. 2330).[7] Appellant contends that simply because Farina did not spell out specifically that the bulk of his funds were not on deposit in the bank but were kept in a receptacle in his parents' home, the Commission must perforce find that Farina "falsely represented his financial position to the Commission" (Br. 13). There is no merit to this argument.

The responses given by Farina in the application were truthful. Thus, he did have "in excess of $54,000" in a "bank or other depository", just as he stated in Item 3(a). Similarly, he did have "savings and checking accounts" in the Fidelity Union Trust of Newark, New Jersey, as

---

[7] The Supreme Court stated in Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, that any doubts as to the applicability of agency rules "are removed by reference to the administrative construction". Here the Commission has found that the misunderstanding as to the location of Farina's funds stemmed from the ambiguity of its application form. The Commission's interpretation of its form in this respect must be afforded great weight. Bowles v. Seminole Rock & Sand Co., supra; National Labor Relations Board v. Hearst Publications, Inc., 322 U.S. 111; Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134.

indicated in Item 3(b)-(e), although the bulk of Farina's funds were concededly not in these accounts but were retained in the receptacle in his parents' home. Moreover, the record is barren of any evidence that Farina intended to mislead the Commission in any way, or to create the impression that all of his funds were on deposit in the named bank. Thus, Farina has never affirmatively represented to the Commission that all of his $54,000 was in the bank. Indeed, in the plan of financing appended to his application, Farina stated that he had "cash on hand in excess of $54,000". Surely if his intentions were to mislead the Commission, he would have identified these funds as "cash in bank" (R. 2352). Similarly, when Farina submitted a revised plan of financing in an amendment to his application dated August 30, 1960, he stated that he had "cash on hand in excess of $54,000" instead of a bank deposit (R. 2412). Thus, throughout his application, his exhibits, and his amendments, the $54,000 sum Farina indicated was available for financing the construction and operation of his station, was never identified as a bank deposit, but as "cash on hand".[8]

The record contains ample evidence establishing a logical and reasonable explanation for Farina's responses in the application. Thus, Farina testified that, in responding to question 3(a) of Section III, he assumed that in asking for the amount of funds "on deposit in bank or other depository" the Commission wanted the amount of cash he had either in a bank or elsewhere and he answered this question truthfully by stating "in excess of $54,000" (Tr. 2129-2130). The Commission has consistently held that incorrect or inaccurate statements in an application do not reflect adversely on an applicant where, as here, it does not appear

---

[8] There is no merit to appellant's argument (Br. 13) that "even if it were assumed arguendo that the form is ambiguous '. . . in that it assumes that the amount described in 3a is deposited in a bank . . .,' no rational or remotely acceptable explanation could conceivably excuse the representation that the conditions of such 'deposit' were 'savings and checking accounts. . .'." For the record shows that Farina did in fact have savings and checking accounts at the named bank, and that such accounts were subject to the conditions listed by Farina in his responses in Section III of the form (R. 2287). The Commission, moreover, properly found that Farina did not mean to imply that all of his $54,000 sum was on deposit in these accounts (R. 2330).

that any willful deception, concealment or intent to mislead the Commission was involved, Midland National Life Insurance Co., 4 Pike & Fischer, RR 1269; Airwaves, Inc., 3 Pike & Fischer, RR 142. Similarly, the Commission has held that an inadvertent omission in supplying information relating to a change in a plan of financing, absent an actual showing of misrepresentation, does not demonstrate willfulness or reckless disregard of licensee responsibility, Station WIBS, 5 Pike & Fischer, RR 547. Indeed, even where an applicant borrowed a large sum, deposited it in a bank, listed the deposit in an application, and then withdrew the amount to repay the loan, the Commission held that if the applicant in fact had the amount in question available to it, albeit not on deposit in a bank, no inference of bad faith should be drawn. Southwest Broadcasting Company, 5 FCC 616.

Appellant's contention (Br. 14) that "all the other facts of record are persuasive that Farina's admittedly false representation concerning his finances was willful and deliberate" is wholly erroneous. In the first place, there is no "admittedly false representation". For, as the Commission properly found, there is a total absence of any evidence of intent on Farina's part to mislead the Commission (R. 2330). [9]

Appellant's assertion that "an obvious motive" for Farina to mislead the Commission was his desire to hide the fact that the bulk of his

---

[9] Appellant argues (Br. 15) that "the Commission erred as a matter of law in concluding that the claimed absence of apparent motive is a mitigating factor", citing Hall v. Federal Communications Commission, 99 U.S. App. D.C. 86, 237 F.2d 567. Appellant's reliance on the Hall case, however, is misplaced. For, here, the Commission did not hold, as appellant asserts, that the absence of any motive is a mitigating factor. Rather, the Commission concluded that "the total absence of any motive or evidence of intent to mislead the Commission", coupled with the "somewhat ambiguous nature" of the questions posed in the application form, persuaded it that "Farina was not guilty of a misrepresentation" (R. 2330). The Hall case, on the contrary, involved a willful, calculated and deliberate misrepresentation with respect to an applicant's intention regarding the location of its site; and the Court stated that, in such circumstances, it is not an answer to say that the deception was unnecessary and served no purpose. This is a far cry from the instant case where the record contains no evidence whatever to show a willful, calculated or deliberate misrepresentation.

funds were in a receptacle in his parents' home in order to avoid the evidentiary hearing that the Commission would have been sure to require if it had been aware of this, is sheer speculation unsupported by any evidence. Moreover, the story of Farina's finances is not as "bizarre" as appellant would have us believe. Thus, as the examiner noted, Farina aspired to operate his own radio station for many years and had been saving his money toward this end. With the assistance of his parents, he was able to save a substantial sum of money. In light of his parents' apprehension about placing large sums of money in banks, Farina's family maintained a general cash receptacle in their home; and over the years, the members of the family deposited their savings in this receptacle. It was agreed between Farina and his parents that the funds he deposited therein were his and were to be available for his use in establishing a radio station (R. 2288, Tr. 2100-2106, 2115-2120, 2129-2130). Immediately prior to the filing of his application in this proceeding, Farina and his parents determined that the amount of cash he had in the family receptacle was in excess of $54,000 (Tr. 2130).

Appellant has failed to establish that the Commission's findings and conclusions that Farina was not guilty of misrepresenting his finances are not based on substantial evidence. The Supreme Court in Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 488, outlined the function of a reviewing court in a proceeding such as this:

> "To be sure, the requirement for canvassing 'the whole record' in order to ascertain substantiality does not furnish a calculus of value by which a reviewing court can assess the evidence. Nor was it intended to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect. Nor does it mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views,

> even though the court would justifiably have made a different choice had the matter been before it de novo. Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view." (Emphasis added).

Under the doctrine of Universal Camera, the Commission's decision here must clearly be affirmed. Thus, as this Court stated in Kidd v. Federal Communications Commission, 112 U.S. App. D.C. 288, 289, 302 F.2d 873, 874:

> "It would serve little purpose to detail here all the charges and counter charges contained in the record. With questions of the present sort, centering on the character of an applicant, our function is primarily to see whether the Commission's judgment, based on the record as a whole, is reasonable and within its proper discretion. Cf. Federal Communications Commission v. WOKO, Inc., 329 U.S. 223, 229, 67 S.Ct. 213, 91 L.Ed. 204 (1946). Here, the Commission considered and adequately dealt with the major contentions advanced by appellant. Within fairly broad limits, the relative weight to be given to all the relevant factors presented must lie in the sound discretion of the Commission. On the basis of the record before us, we think that the Commission acted reasonably and within its discretion in finding Poor to be qualified."

Certainly the evidence here "is not so unsubstantial as to lead . . . a reviewing court to hold the findings lack legal support", Sacramento Broadcasters, Inc. v. Federal Communications Commission, 98 U.S. App. D.C. 394, 236 F.2d 689; see, also, McKenney v. Federal Communications Commission, ___ U.S. App. D.C. ____, 324 F.2d 444; WJIV-TV, Inc. v. Federal Communications Commission, 97 U.S. App. D.C. 391, 392, 231 F.2d 725, 726; City Cabs, Inc. v. Federal Communications Commission, 107 U.S. App. D.C. 136, 275 F.2d 165.

II.

THE COMMISSION PROPERLY ACCORDED FARINA A PREFERENCE ON PREPARATION AND PLANNING

Appellant contends (Br. 16-19) that the preference accorded Farina by the Commission for planning and preparation is not supported by substantial evidence. The record, however, contains ample support for the Commission's findings and conclusions.

In the first place, both the examiner and the Commission found serious deficiencies in appellant's planning and preparation. Since appellant is not challenging the Commission's findings and conclusions in this regard, but has confined its attack to the Commission's treatment of Farina on this factor, it is pertinent to explore appellant's showing in this area.

The Commission affirmed the examiner's finding that appellant's efforts in ascertaining the programming needs of the Burlington-Mt. Holly area leave much to be desired. Thus, the Commission was constrained to note that (R. 2321):

> "Aside from culling a few statistics regarding the Burlington area, Halpern and Seltzer acquired no familiarity therewith until after the applications had been designated for hearing and the program proposals frozen." [10]

---

[10] The examiner had found as follows (R. 2257):

> "On cross-examination Seltzer's testimony reflected glaring weaknesses as it pertains to his contacts relative to programming and planning in Burlington. Among the things that he testified to were that he had not visited any schools in Burlington; had not visited any churches or synagogues; had not conferred with any religious leaders in Burlington and further he had not conferred with any educational or agricultural leaders respecting the pattern of programming for the proposed station. In addition to the foregoing, Seltzer testified that he did not know the President of the Chamber of Commerce in Burlington, nor the President of the Burlington Rotary Club, nor the Superintendent of the Burlington Schools, nor the President of the Burlington Junior Chamber of Commerce, nor the head of the Ministerial Association. In summation, Seltzer was very evasive as to whom he actually talked with in the city of Burlington about the partnership's proposed radio station. The record is void of any contacts that Seltzer made in Mount Holly

(continued on next page)

In contrast, the Commission concluded that "only Farina's preparation was reflected in his program proposal" and the Commission "awarded Farina a significant preference over his competitors in this area . . ." (R. 2321). The record fully supports this conclusion.

Farina first conducted a statistical and historical study of Burlington County (Tr. 2009). He then discussed the makeup and development of the region with Dr. Henry Bisbee, Burlington County Historian, as well as with the Ocean County Historian (Tr. 2419-2423). By means of personal monitoring, Farina became familiar with the type and content of radio service available in the area (Tr. 2062-2064). In addition, Farina attended service club meetings in the area (Tr. 2427-2430). Believing that programming contacts would be helpful in ascertaining the needs and desires of the community, and to assure that local participation and cooperation would be forthcoming in connection with his proposed public

---

[10] (continued from preceding page)
about the proposed Burlington station. It is evident that Seltzer relied for the programming phase primarily on Halpern, his partner, who will not be general manager of the proposed station. The theme of the testimony of both Halpern and Seltzer was that the proposed Burlington station would be largely tailored after their successful Coatesville plan of operation." (Underlining that of Examiner).

Similarly, the examiner concluded (R. 2300):

> "Although Seltzer is to be the manager of the Burlington Broadcasting station, his partner, Halpern, was responsible for the programming. The evidence in the case is that Halpern, as he testified, basically predicated his plan of programming upon his experience at Coatesville. He testified that he spent 17 days from February 20 to March 23, 1961, contacting 98 different persons in the area relative to programming. The record does not reflect how these contacts were made and the evidence is fragmentary on the subject. These contacts, however, were all made after the program proposal had been submitted to the Commission. Seltzer, although he testified that he had spent 5% of his time in the area, knew very little about the subject of programming for Burlington City. His acquaintances, from the record, are extremely limited in the area and he admitted that he did not know the president of the Chamber of Commerce in Burlington, nor the president of the Burlington Rotary Club, nor the superintendent of the Burlington Schools, nor the president of the Burlington Junior Chamber of Commerce, nor the head of the Ministerial Association there. As the record stands, Halpern reached the decision for the proposed programming from the past operations of the Coatesville station with little assistance,if any, from Seltzer."

service programming, Farina drafted a "contact form" containing questions relating to programming needs not being met by outside services available to the community and the manner in which the proposed station might meet such needs. Farina used such forms in making extensive contacts through his proposed service area (Tr. 2053, 2427-2428). Farina obtained the advice and aid of Dr. Bisbee and his wife in compiling a representative list of contacts in the Mt. Holly-Burlington area (Tr. 2421-2426). More than 150 contacts were made in Farina's proposed service area ranging from Burlington County through Ocean County in New Jersey, as well as in lower Bucks County in Pennsylvania (Tr. 2325-2326). Finally, Farina incorporated the ideas and suggestions of persons contacted in developing his proposed programming (Tr. 2024-2030, 2041-2042, 2429-2430).

The examiner's findings with respect to Farina's proposed programming, which findings were not challenged by appellant, graphically demonstrate the extensive contacts made by Farina in developing his programming and establish that his programming is clearly based on such contacts. Thus, in connection with Farina's agricultural programming the examiner found (R. 2274):

> "The proposed agricultural program was developed as a result of consultations between Farina and certain county farm agents in the area and members of their staffs. In addition, Farina contacted members of the Rutgers Agricultural Extension Service and Rutgers University Radio Center as to agricultural special programs which were distributed by New Jersey State University. Some of the data that Farina used was made available to him by the Agricultural Extension Service." (Emphasis added).

With respect to Farina's educational programs, the examiner found (R. 2274):

> "The Mt.Holly-Burlington educational program was determined after interviews and conferences with educators in the service area, including the Burlington County Supervisor of Schools, Burlington City School Supervisor, the Mount Holly Librarian and the Burlington County City Librarian. The Burlington County Supervisor entered into

an agreement for the School of the Week program to be furnished through tape-recorded material to be made by members of the various school faculties as part of their regular classroom procedure. The proposal embodies a full schedule of educational programs prepared and distributed by Rutgers University, as well as special programs prepared by such institutions as New York University, Cornell University and Pennsylvania State University." (Emphasis added).

With respect to Farina's talk and discussion programming, the examiner found (R. 2275):

"Farina's program for discussions and talks was predicated in part on conversations with various citizens in the community including the Burlington County State Senator and with certain individuals from the nearby military installations. He also expects to present bi-monthly taped reports of Congressional activities prepared and released by the two United States Senators from New Jersey." (Emphasis added).

With respect to Farina's proposed religious programming, the examiner found (R. 2275-2276):

"Clergymen of every major denomination were interviewed by Farina and after a canvass of the clergymen this applicant was under the impression that few clergymen had been invited in the past to participate in programs at nearby Philadelphia or Trenton stations. A Presbyterian Minister, Reverend Guy Lambert, has accepted the task of advising Farina on religious questions and protocol. Farina plans to have tape-recorded music by area church organists, music groups and choirs and to establish a library of taped liturgical music for clergymen desiring to use them." (Emphasis added).

With respect to Farina's proposed news programming, the examiner found (R. 2276):

"Farina has visited the office of United Press International and the Associated Press in New York, as well as monitoring stations and conducting interviews with those directly concerned with newsgathering and presentation. Most of the newscasts will be rewritten with an emphasis on local news. Farina has made arrangements with, and will employ a system of, strategically placed 'stringers' through the service area, which will supply the station's news staff with local events."

These findings, unchallenged by appellant, are clear support for the Commission's conclusion that "only Farina's preparation was reflected in his program proposal" (R. 2321).

Appellant challenges the Commission's awarding of a preference to Farina in two respects. First, it submits that the Commission improperly gave Farina credit for contacts undertaken in the Toms River area; and, second, it contends that the Commission improperly rejected the examiner's conclusion that 4 of the 151 persons listed as having been contacted by Farina were not so contacted. Neither of these contentions has merit.

Appellant first adverts to the fact that the examiner found that a number of Farina's program proposals and contacts had been made in connection with the programming for an earlier application for Toms River, New Jersey in which he had assisted. Although it is not spelled out in its brief, appellant is apparently quarrelling with the Commission's rejection of the examiner's conclusion in this respect. Thus, the Commission stated that "the Examiner deprecated Farina's contacts, noting that some were made nearer to Toms River (where Farina had helped one Zaccagnino with the latter's application) than Mount Holly" (R. 2320). The Commission pointed out, however, that (R. 2320):

> "Toms River is 30 miles from Mount Holly and lies within Farina's proposed interference-free contour. Thus, contacts in the Toms River area, even though made with another proposal in mind, would be of use in acquainting Farina with the needs of his service area. Moreover, it is to be noted that a regional channel is involved here, and contacts limited to the principal community may well be an inadequate basis for designing programs to meet area-wide needs."

Certainly, it is for the Commission to evaluate the suitability and propriety of an applicant's programming contacts and to weigh their effectiveness in its comparative process, see McClatchy Broadcasting Co. v. Federal Communications Commission, 99 U.S. App. D.C. 195, 239 F.2d 15; Henry v. Federal Communications Commission, 112 U.S.

App. D.C. 257, 302 F.2d 191; Beachview Broadcasting Corp. v. Federal Communications Commission, 104 U.S. App. D.C. 377, 262 F.2d 688, cert. denied, 359 U.S. 936; Tampa Times Co. v. Federal Communications Commission, 97 U.S. App. D.C. 256, 230 F.2d 224.

In evaluating Farina's planning and preparation, the examiner stated that "a cloud . . . is cast upon some of the contacts alleged to have been made by Farina . . ." (R. 2272). He submitted that "a weakness in the Farina endeavor is displayed by the controverted testimony of four witnesses, namely, Amos Hope, Clarence Marshall, Nils Johnson and Miss Mary A. Symonds, all long-time and prominent citizens of the Burlington-Mount Holly area" (R. 2301). He concluded in light of this that "doubt readily appears as to the thoroughness, conclusiveness and reliability of the evidence respecting the Farina contacts" (R. 2273-2274). The Commission, however, rejected the examiner's findings and conclusions in this respect (R. 2320).

Only 4 out of the 151 persons listed as having been contacted by Farina testified that they could not remember having been contacted. The examiner surmised that if this "is a fair sampling of the contacts that Farina allegedly made respecting the establishment of his radio station at Mount Holly, doubt readily appears as to the thoroughness, conclusiveness and reliability of the evidence respecting the Farina contacts" (R. 2273-2274). The Commission, however, properly found that "the record as a whole supports the conclusion that Farina did in fact talk to the four named individuals" (R. 2320).[11]

---

[11] The examiner did not purport to base his conclusions on his observation of the demeanor of the witnesses. Rather, his judgment was based on what the evidence disclosed, i.e., a "derivative inference" based on the contents of the testimony. American Tobacco Co. v. The Katingo Hadjipatera, 194 F.2d 449 (2d Cir.). An administrative agency may substitute its own derivative inferences for those of its examiner where, as here, such inferences rest on the significance of the recorded testimony as accepted by the examiner. Federal Communications Commission v. Allentown Broadcasting Corporation, 349 U.S. 358. Certainly the Commission is no less competent than its examiner to reach conclusions respecting the evidence.

A basic fallacy in the examiner's rationale is that it was premised on the erroneous presumption that the four witnesses presented by Burlington County who challenged Farina's contacts were a "fair sampling" of Farina's contacts. On the contrary, the record shows they are far from a "fair sampling". In the first place, only 4 out of the more than 150 contacts made by Farina were even questioned. No doubt whatsoever was raised with respect to any of the other 147 contacts made by Farina. Thus, it may be concluded that no basis existed for criticizing the remaining program contacts, see Johnson Broadcasting Co. v. Federal Communications Commission, 85 U.S. App. D.C. 40, 175 F.2d 351. Indeed, as pointed out, supra, the examiner himself noted throughout his findings that Farina's proposed programming is based on extensive contacts made both for the purpose of determining need and for soliciting assistance in producing programs. Thus, the Commission properly concluded that the fact "that an opposing applicant was able to present four of the named individuals to testify that they had no recollection of having met or talked with Farina does not seriously detract from the validity of the remaining 147 contacts" (R. 2320). In sum, even assuming arguendo that the four questioned contacts were not made, there is no doubt that Farina's program proposal, unlike that of appellant's, is grounded on an extensive survey of program needs and that the effectuation of the proposal has been assured by extensive promises of participation by local groups and individuals.

Even more important, the record does not support the examiner's presumption that the four witnesses were not in fact contacted by Farina.[12]

---

[12] It is more than pure coincidence that all four witnesses who challenged Farina's contacts are tied in some way to Burlington County principals. Thus, Marshall has been one of Sleeper's employees for 16 years. Hope is a long-time personal acquaintance of Sleeper. Nils Johnson has been a neighbor of another of Burlington County's principals for 20 years and has been a dealer handling Sleeper's newspaper for some 5 years. And Miss Symonds must depend on Sleeper's newspaper for support in view of her public position (Tr. 2361, 2363, 2388, 2402). The examiner, in weighing the testimony of these witnesses, failed to consider their possible bias in view of their close association with Burlington County.

A careful examination of the testimony of these witnesses shows that, in point of fact, three of them were not sure that Farina did not contact them (Tr. 2361, 2363, 2402). Moreover, as the Commission noted, "it must not be overlooked that the contacts in question occurred in 1959, and the testimony with respect thereto was received in November 1961" (R. 2321). Further, the Commission cogently pointed out that "Farina's purpose in making the contacts was to familiarize himself with the community and to determine its needs and desires, a goal capable of being realized without mention of his name or of his intent to seek a radio station, and it is hardly surprising that some of those contacted may have been unable to recall the event over two years later" (R. 2321). Thus, Hope and Johnson, although first stating they did not remember having spoken to Farina, acknowledged on cross-examination that such conversations could have taken place. And Hope, moreover, agreed that he may have possibly been introduced to Farina at a joint civic club meeting (Tr. 2361, 2402).

The fact that the four disputed contacts were in fact made, moreover, is corroborated by the testimony of Dr. and Mrs. Bisbee. Thus, with respect to Amos Hope, Mrs. Bisbee testified that she dialed Hope's number for Farina and Dr. Bisbee testified that he introduced Farina to Hope by telephone and listened while Farina and Hope discussed the proposed programming of the station (Tr. 2433, 2479-2480). Similarly, with respect to Nils Johnson, Mrs. Bisbee testified she recalls having looked up his number and dialing it for Farina (Tr. 2480); and Dr. Bisbee testified that he assisted in making a telephone call to the representative of Johnson's group, the Burnt Cork Association (Tr. 2439). With respect to Clarence Marshall of the Elks, Dr. Bisbee testified that he knew that Farina contacted someone at the Elks Club, although he had no independent recollection as to whether or not it was Marshall (Tr. 2440). Finally, as to Miss Symonds, Mrs. Bisbee testified that she dialed the County Office, asked to speak to a representative of the TB Association, was connected with a woman and thereupon turned the phone

over to Farina who spoke to the woman, although she does not recall specifically whether the woman was Miss Symonds (Tr. 2481).

The foregoing clearly establishes that, on the basis of its consideration of the record as a whole, the Commission properly awarded a preference to Farina on planning and preparation. Since the Commission's decision rests on substantial evidence, it should not be overturned. Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474; Kidd v. Federal Communications Commission, 112 U.S. App. D.C. 288, 289, 302 F.2d 873, 874; Tampa-Times Company v. Federal Communications Commission, 97 U.S. App. D.C. 256, 259, 230 F.2d 224, 227.

III.

THE COMMISSION PROPERLY EVALUATED FARINA'S BROADCAST EXPERIENCE

There is no merit to appellant's contention (Br. 16) that "the preferences accorded Farina by the Commission under the criteria of . . . broadcast experience are not supported by substantial evidence".

In the first place appellant's contention is wholly misleading. For the Commission did accord appellant "first preference" on this score, and appellant's superiority on this factor was given full consideration in the comparative evaluation of the applicants (R. 2322, 2324-2325).[13] Thus, the Commission concluded that (R. 2322):

> "Halpern-Seltzer, who have owned and operated Station WCOJ, Coatesville, Pennsylvania, since 1949, are conceded by the other applicants as deserving a first preference here."

Again, in its summation, the Commission stated that (R. 2324):

> "Halpern-Seltzer, the only applicant with experience in owning and operating a broadcast station is deserving of a preference in this area . . ."

---

[13] Broadcast experience was the only factor on which appellant was awarded a preference (R. 2325).

Appellant's contention is thus not that the Commission failed to accord it the preference to which it believes it is entitled, but that the Commission "watered down" this preference to some extent by concluding that Farina is not wholly lacking in broadcast experience.

The examiner characterized Farina's experience as "minimal, regardless of his years of interest in radio work" (R. 2300). However, the Commission evaluated Farina's experience, as developed in the record, somewhat differently. Thus, while agreeing with the examiner that appellant warrants a first preference, the Commission concluded that "Farina is preferable to County in this regard by virtue of his employment in the program division of the National Broadcasting Company since 1947" (R. 2322). And, in reviewing Farina's overall showing on the comparative criteria, the Commission stated (R. 2325):

> "Thus, Farina has been preferred for preparation, planning, and programming; integration; and diversification. County has won a preference for its area familiarity, and Halpern-Seltzer, for broadcast experience. While Farina lacks area familiarity, as defined in paragraph 21, supra, his extensive contacts and planning indicate more than the typical non-resident's awareness of community needs. Neither is he devoid of experience in broadcasting, for his years spent in NBC's program division as a 'Qualified Production Assistant', should stand him in good stead in developing programming for his own station. Thus, Farina has offered abundant assurance in several criteria, and adequate assurance in each of the others, that a program proposal serving the public interest will be effectuated, and that he may be expected to operate throughout his license term in the public interest. On the other hand, both County and Halpern-Seltzer have shown weaknesses with respect to one or more of the criteria. The former's lack of experience and the latter's lack of area familiarity have not been compensated by showings under other factors. County offers only area familiarity and partial integration, unreinforced with a strong showing of preparation to compensate for lack of experience. Similarly, Halpern-Seltzer did little to cure their lack of familiarity with the area to be served and offer us only an experienced broadcaster (with a 'satisfactory' record) and partial integration." (Emphasis added).

Appellant's contention (Br. 22) that "the record is entirely devoid of any evidence whatsoever that Farina's experience in this respect would be at all helpful or pertinent . . . in developing programming for his station", is specious. The record contains ample evidence to support the Commission's conclusion.

The record shows that Farina's interest in radio was first kindled while still in high school, when he participated in a number of public service broadcasts over a local radio station in Newark, New Jersey (R. 686, 2270, Tr. 2020-2022). Later, while at New York University, Farina minored in broadcasting, taking such subjects as newswriting, direction and sales presentation (R. 685, Tr. 2012-2014).[14] In 1948, when the Newark Board of Education's FM educational station went on the air, Farina volunteered his services gratis to assist in the production of educational programs. He devoted some eight months to producing book reviews, discussion and dramatic programs (Tr. 2019, 2271, R. 688). Farina, in addition, has made a study of numerous radio stations over the past 15 years from the standpoint of such matters as staffing, presentation of local live programming and news presentation (Tr. 2203-2204, 2224, 2371, R. 693).[15]

In 1947, after leaving the Navy, Farina joined the Guest Relations Staff of the National Broadcasting Company (NBC) in New York City, being first assigned to the program division (R. 687).[16] In 1950 he was promoted to Assistant Supervisor of Staging Services, Television Facilities, at NBC (Tr. 2013, 2181). In this capacity Farina supervised stage

---

14 While attending New York University, Farina studied under Charles Siepman, one of the authors of the Federal Communications Commission publication entitled "Public Service Responsibility of Broadcast Licensees", popularly known as the "Blue Book" (R. 685).

15 Farina joined a group of producers who devised a series of telefilms under the auspices of the National Trust for Historic Preservation. He spent 18 months in his spare time compiling 176 subjects for American Heritage Telefilms, writing scripts for four programs, including the script for the pilot film on Port Salem (Tr. 2016).

16 Farina was employed by NBC from 1947 to September 1961, when he resigned to devote full time to his instant application (R. 2271).

hands, stage carpenters, and scenic artists (Tr. 2185). He has been responsible for the carpentry shop, the drapery section, the prop securing section, and transportation (Tr. 2184).

During his employment at NBC, Farina completed courses in radio program production conducted by the NBC Network Staff; as well as a series of courses in announcing given by chief of NBC's announcing staff (R. 687-688, Tr. 2014-2015, 2185, 2271). He also took courses sponsored by the network at the RCA Institute on such subjects as camera work, direction, use of studio facilities and related subjects (R. 2271, Tr. 2014-2015, 2185). After taking refresher courses at the Institute in 1959 (R. 688, Tr. 2014), Farina was given the title of "Qualified Production Assistant" (Tr. 2185-2186, 2271).

Thus, contrary to appellant's contention, the record fully supports the Commission's conclusion that Farina's experience, while not equal to appellant's, is nevertheless not wholly lacking, and will prove helpful to Farina in the operation of his station. Appellant's argument in effect is not that the Commission's decision is not based on substantial evidence, but that the Commission improperly evaluated Farina's experience as established in the record. However, "the comparative experience of the applicants" is a matter "peculiarly within the province of the Commission", Brown Telecasters, Inc. v. Federal Communications Commission, 110 U.S. App. D.C. 127, 129, 289 F.2d 868, 870, cert. denied, 368 U.S. 916. As the Court stated in Tampa Times Co. v. Federal Communications Commission, 97 U.S. App. D.C. 256, 259, 230 F.2d 224, 227:

> "The Congress conferred upon the Commission the task and the responsibility of evaluating comparative claims of mutually exclusive applicants. So long as it observes all procedural requirements, considers the issues, reaches reasoned conclusions, and renders reasoned judgment, courts cannot superimpose their opinions upon these matters."

CONCLUSION

For the foregoing reasons, the Commission's Decision and Order under review in this case should be affirmed.

Respectfully submitted,

BENITO GAGUINE

HERBERT M. SCHULKIND
1612 K Street, N. W.
Washington, D.C. 20006

Attorneys for Intervenor.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WILLIAM S. HALPERN and LOUIS N. SELTZER, d/b as BURLINGTON BROADCASTING COMPANY,	)	
Appellant,	)	
v.	)	Case No. 17,988
FEDERAL COMMUNICATIONS COMMISSION,	)	
Appellee,	)	
MOUNT HOLLY-BURLINGTON BROADCASTING COMPANY, INC.,	)	
WEST JERSEY BROADCASTING COMPANY,	)	
Intervenors.	)	

PETITION FOR REHEARING OR IN THE ALTERNATIVE PETITION FOR REHEARING EN BANC

William S. Halpern and Louis N. Seltzer, d/b as Burlington Broadcasting Company (hereinafter referred to as "Appellant") respectfully petitions this Court for rehearing, or in the alternative for rehearing en banc.

The Order of this Court dated March 17, 1965, which denied the motion for remand of the Federal Communications Commission (hereinafter referred to as "Commission") and granted the motions of West Jersey Broadcasting Company (hereinafter referred to as "West Jersey") and John C. Giordano, Receiver of the assets of Mount Holly-Burlington Broadcasting Company, Inc. (hereinafter referred to as "Receiver"), is invalid for the reason that it is contrary to the standards of judicial review of actions of an

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WILLIAM S. HALPERN and LOUIS N. SELTZER, d/b as BURLINGTON BROADCASTING COMPANY,	)	
Appellant,	)	
v.	)	Case No. 17,988
FEDERAL COMMUNICATIONS COMMISSION,	)	
Appellee,	)	
MOUNT HOLLY-BURLINGTON BROADCASTING COMPANY, INC.,	)	
WEST JERSEY BROADCASTING COMPANY,	)	
Intervenors.	)	

PETITION FOR REHEARING OR IN THE ALTERNATIVE PETITION FOR REHEARING EN BANC

William S. Halpern and Louis N. Seltzer, d/b as Burlington Broadcasting Company (hereinafter referred to as "Appellant") respectfully petitions this Court for rehearing, or in the alternative for rehearing en banc.

The Order of this Court dated March 17, 1965, which denied the motion for remand of the Federal Communications Commission (hereinafter referred to as "Commission") and granted the motions of West Jersey Broadcasting Company (hereinafter referred to as "West Jersey") and John C. Giordano, Receiver of the assets of Mount Holly-Burlington Broadcasting Company, Inc. (hereinafter referred to as "Receiver"), is invalid for the reason that it is contrary to the standards of judicial review of actions of an

administrative agency.

STATEMENT OF FACTS

Early in 1958, the principals of Appellant concluded that there was a need for a new standard broadcast station in Burlington County. On November 18, 1958, after engineering studies conducted by one of its two principals, Appellant filed its application for a station in Burlington County. After further studies and investigations, it amended its application to specify the technical facilities involved herein. As the Commission later found, Appellant was fully qualified in all respects -- legally, technically and financially -- to construct and operate these facilities in the public interest.

However, Appellant's application remained dormant in the Commission. On January 23, 1960, a competing application was filed by Burlington County Broadcasting Company; and on February 26, 1960 -- literally on the eve of the "cut-off" date -- a second competing application was filed by John J. Farina. On February 1, 1961, the Commission designated the three applications for hearing in a consolidated proceeding. On June 14, 1963, following an extensive evidentiary hearing and oral argument, the Commission granted the application of Farina.[1/]

1/ The permit thus granted by the Commission was later assigned to Mount Holly-Burlington Broadcasting Company, Inc. which is 98% owned by Farina; the remaining 2% are qualifying shares owned by members of Farina's family.

Thereafter, Appellant took its appeal to this Court on the grounds that the Commission erred in its findings and conclusions with respect to the financial qualifications of Farina and the merits of that application as compared with Appellant's application. In an Opinion dated March 19, 1964, this Court concluded that the Commission had failed to make or require adequate inquiry into the question of Farina's financial resources. Accordingly, the Court concluded: "We retain jurisdiction and remand for the development of a more adequate record."

The Commission proceeded as ordered by this Court and the case was remanded to a Hearing Examiner on May 1, 1964. On July 10, 1964, Farina advised the Commission that he was withdrawing from the further prosecution of the matter, claiming that one of his creditors had secured a Court Appointed Receiver to take over his corporation. On July 16, 1964, the Receiver 2/ requested Commission consent to the involuntary assignment of the construction permit from the permittee to him. Several days later, the Receiver sought intervention, claiming that he would either go forward to meet the issues pursuant to the Court's earlier remand and the proposed further hearing or that he would propose other appropriate action. The

---

2/ The Receiver is not acting generally for the benefit of all creditors but only for the National State Bank of Elizabeth, Farina's largest creditor.

Commission authorized the Receiver to file a brief stating his position.

On September 15, 1964, a newly organized corporation, West Jersey, which theretofore had not been a party to the proceeding and which had not in any fashion evinced any interest in the proceeding, tendered to the Commission an application for the facilities involved herein together with a request that the Commission waive its cut-off rules so as to permit consideration of its application in a comparative hearing with Appellant and such other new applications as might be filed. On September 18, 1964, the Receiver filed a brief with the Commission stating that he could not proceed under the remand issues inasmuch as Farina refused to testify voluntarily "in any further hearing". Acknowledging that Farina's successor corporation could not be the ultimate recipient of the license and that Appellant's application could be granted on the existing hearing record, the Receiver suggested nevertheless that the grant be made to West Jersey since that company had represented it would reimburse the creditors of the permittee.

On December 10, 1964, the Commission filed a motion with this Court for remand of the proceeding for the purpose of adopting as the Commission's supplemental decision a "Report and Recommendation" setting aside its earlier grant to Farina and granting the application of Appellant. The decision of the Commission proposing to grant Appellant's application was based on explicit findings that Appellant is the preferred applicant and fully capable of operating these facilities in the public interest, convenience

and necessity. Further, the Commission proposed to dismiss the Farina application because of his failure to prosecute his application. Finally, the Commission proposed to deny the West Jersey "Petition for Waiver" and not to accept the West Jersey application.

The Receiver and West Jersey filed with this Court motions for leave to intervene and oppositions to the FCC motion to remand. A panel of this Court, consisting of Judges Miller, Burger and Wright, acting without the benefit of briefs or oral argument, rejected the disposition of this case proposed by the FCC and granted the relief requested by West Jersey and Receiver.

To recapitulate briefly -- over a period of seven years Appellant has dilligently pursued a license for a radio station in the small (Population - 12, 688) community of Burlington, New Jersey and at a cost of more than $7[illegible], 000. The Commission has finally determined that Appellant is the preferred applicant to operate in the public interest, convenience and necessity. Nevertheless, Appellant is now told by the Court that all its efforts and expenditures have been in vain; and that it must now prepare itself to compete anew with a fresh group of applicants. And this drastic conclusion is advanced with no reason or explanation whatsoever.

ARGUMENT

In denying the motion of the Commission for remand this Court departed from established standards of judicial review of agency action and, in effect, arrogated to itself the powers and responsibilities vested by

the Congress in the Commission. It is a basic principle of the division of power under our system of government and accepted standards for judicial review that a Court may review and upset an administrative determination only where it is not supported by substantial evidence, or where a material error of law was committed, or where such a determination was the product of fraudulent actions.

In this case the Commission provided the Court with the full factual background leading to its proposed "Report and Recommendation". The Commission expressed no hesitancy or doubts regarding the qualifications of the Appellant as the proposed grantee. Indeed, Appellant had been found earlier to be fully qualified by the Commission, and finally was determined to be the preferred applicant. The Commission had also considered the suggestion of opening the proceedings to new applicants but decided, based upon an application of its rules which had repeatedly been affirmed by this Court, that no justification for such action existed.

In the face of this record, the Order of this Court remains not only without explanation but subject to questioning as an undue exercise of judicial power. It has been clearly established by the Supreme Court of the United States that the duty of the Court, in reviewing an administrative order, is at an end when it becomes evident that the order is based on substantial evidence and is consistent with statutory powers, since the wisdom of the order is not a matter properly before the Court. Securities and Exchange Commission v. Chenery Corp., 1947, 67 S. Ct. 1575, 332 U. S. 194, 91 L. Ed.

1995, rehearing denied 68 S. Ct. 26, 332 U. S. 783. American Telephone and Telegraph Co. v. U. S., 299 U. S. 232, 81 L. Ed. 142. Likewise, a court may not substitute its judgment for that of an administrative agency where the problem facing the latter is one of wisdom and expediency within the limits of its jurisdiction. Willpoint Oysters v. Ewing, C. A. 9, 1949, 174 F. 2d 676, cert. denied 70 S. Ct. 101, 338 U. S. 860. U. S. v. Corporation of President of Church of Jesus Christ of Latter-Day Saints, C. C. A. Utah 1939, 101 F. 2d 156. Kessler v. F.C.C., C. A. D. C. 1963, 326 F. 2d 673, 117 U. S. App. D. C. 130.

The wisdom of the traditional and established standards which delimit and circumscribe the scope of judicial review of agency action is readily demonstrable by an analysis of the Court's Order in this case. That Order directs the Commission to accept "... the application of West Jersey and any other qualified applicant for the facilities here involved ...". Appellant respectfully submits that such a determination is invalid in any event since that application was not before the Court. Further, it is clear that if the application had in fact been submitted to this Court it would not have undertaken a review of the application to determine whether West Jersey would meet specified Commission standards. Indeed, such a determination can only be made in the first instance by the Commission which subjects such applications to a meticulous examination in order to determine whether the applicant is legally, financially and technically qualified. However, because the Commission

had denied the request of West Jersey for waiver of the cut-off date, that application had never been processed by the Commission.[3/]

The Order directing the acceptance of West Jersey's application is therefore without apparent justification. It is the fact, however, that the Order as it relates to the Receiver raises questions which are possibly even more perplexing. In his prayer for relief, the Receiver, inter alia, requested this Court to issue an Order directing the Commission "... to grant the pending application of John C. Giordano for consent to the assignment to him of the construction permit of Station WJJZ." The Order of this Court apparently granted that request since it directed that "... the aforesaid intervenors' request for affirmative relief is granted ...". In the event that the Court's Order did not direct a grant of the Receiver's application, the question necessarily posed is -- Who is presently operating the station and upon what authority? In the event that the Order did direct a grant of the application, it is of course completely unprecedented since this Court has not, at least until the issuance of its Order in this case, presumed to direct a grant of any application pending before the Commission. It should also be recognized that the assignment of an operating station to a Receiver generally

---

3/ Attention is invited to the repeated and uniform holdings of this Court affirming Orders of the Commission dismissing applications filed after the cut-off date. See "Reply to Oppositions to Motion for Remand and Request for Affirmative Relief Pursuant to Section 402(h) of the Communications Act" (Page 6, Footnote 3) filed by Appellant on January 4, 1965.

contemplates a brief period of operation pending the winding up of the affairs of the insolvent licensee. In this case, however, assignment of the station to the Receiver apparently contemplates operation of the station for the protracted period of a new round of comparative proceedings. In the event the station earns a profit the question posed is -- Will Farina enjoy such profits? And if not Farina, who?

In view of the fact that this Court's Order was devoid of any explanation, Appellant is placed in the exceedingly difficult position of postulating the reasons which impelled the extraordinary and unprecedented action taken by the Court in the Order under review. The only possible explanation which has suggested itself is that the Court mistakenly analogized this case to cases involving ex parte communications. Cases involving such communications but in issue the very integrity of the Commission and its processes. Such cases which involved a fraud on the very fabric of the administrative processes present one of the recognized exceptions to the normal standard of judicial review.[4/] If, indeed, this is the basis upon which the Court proceeded, it is of course readily demonstrable that it is completely inapplicable to this case. For, in the instant case no such circumstances have ever been suggested. Indeed, no irregularity of any kind has ever been imputed to Appellant; on the contrary, its qualifications have been conceded throughout.

One final consideration must be considered by the Court.

4/ See WORZ, Inc. v. F.C.C. (U. S. App. D.C.) Case No. 18,772 Slip Op. March 4, 1965

As a result of Appellant's diligence and at great personal expense it has righted a wrong and prevented a fraud from being perpetrated on the Commission. But for Appellant, the public franchise at issue herein would have vested in Farina. The Order of this Court if permitted to stand will destroy and completely eliminate any incentive in private applicants before the Commission to bring to light evidence of wrongdoing. For, if this Order is permitted to stand the only benefit to be derived from the successful prosecution of an appeal will be exposure to a new round of costly and time-consuming litigation.

WHEREFORE, in view of the above it is respectfully requested that this Court, or the Court en banc grant rehearing and reconsider and set aside the Order issued by this Court on March 17, 1965, and grant the motion for remand filed December 11, 1964 by Appellee Federal Communications Commission.

In view of the questions presented herein, oral argument is respectfully requested.

Respectfully submitted,

William S. Halpern and Louis N. Seltzer,
d/b as BURLINGTON BROADCASTING
COMPANY

By S/ Philip Bergson
Philip Bergson

By S/ Arthur Scheiner
Arthur Scheiner

By S/ Nicholas N. Kittrie
Nicholas N. Kittrie

Its Attorneys

Wilner & Bergson
1343 H Street, N. W.
Washington, D. C. 20005

April 1, 1965

CERTIFICATE OF COUNSEL

Arthur Scheiner, counsel for William S. Halpern and Louis N. Seltzer, d/b as Burlington Broadcasting Company, Appellant in these proceedings hereby certifies that the foregoing "Petition for Rehearing or in the Alternative Petition for Rehearing En Banc" is presented in good faith and not for delay.

S/ Arthur Scheiner
Arthur Scheiner

April 1, 1965

CERTIFICATE OF SERVICE

I, Arthur Scheiner, hereby certify that I have, this 1st day of April, 1965, sent by regular United States mail, postage prepaid, a copy of the foregoing "Petition for Rehearing or in the Alternative Petition for Rehearing En Banc" to the following:

John Conlin, Esquire
Associate General Counsel
Federal Communications Commission
Washington, D. C. 20554

Theodore Baron, Esquire
Scharfeld, Bechoefer, Baron & Stambler
1710 H Street, N. W.
Washington, D. C. 20006
Counsel for Mount Holly-Burlington Broadcasting Company, Inc., Intervenor

Paul Dobin, Esquire
Cohn and Marks
317 Cafritz Building
Washington, D. C. 20006
Counsel for West Jersey Broadcasting Company, Intervenor

S/ Arthur Scheiner
Arthur Scheiner

April 1, 1965

4383

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,988

WILLIAM S. HALPERN AND LOUIS N. SELTZER,
d/b as BURLINGTON BROADCASTING COMPANY,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

MOUNT HOLLY-BURLINGTON BROADCASTING CO., INC.,
Intervenor,

WEST JERSEY BROADCASTING COMPANY,
Intervenor.

OPPOSITION TO PETITION FOR REHEARING FILED BY THE FEDERAL COMMUNICATIONS COMMISSION AND OPPOSITION TO PETITION FOR REHEARING OR IN THE ALTERNATIVE PETITION FOR REHEARING EN BANC FILED BY BURLINGTON BROADCASTING COMPANY

Comes now West Jersey Broadcasting Company (hereinafter referred to as "West Jersey") and respectfully opposes the Petition for Rehearing filed by the Federal Communications Commission (hereinafter referred to as "Commission"), and the Petition for

Rehearing or In the Alternative Petition for Rehearing *En Banc* filed by Burlington Broadcasting Company (hereinafter referred to as "Burlington"). In support, West Jersey states:

Background

1. On December 23, 1964, West Jersey filed a Motion requesting that this Court exercise the powers granted to it by Congress pursuant to Section 402(h) of the Communications Act of 1934 (47 USC, Sec. 402 (h)), and remand the above case to the Commission with specific directions that the Commission reopen the record, entertain new applications for the frequency here involved (such as the West Jersey application), and thereafter hold new comparative proceedings to determine which applicant should be granted the frequency.[1] The grounds of this request, which was directed to the Court's original jurisdiction under Section 402(h), was that the unique circumstances of this case required the granting of the relief sought. West Jersey pointed out: (a) that the original winning applicant in this proceeding (Mount Holly-Burlington Broadcasting Company, Inc., hereinafter referred to as "Farina"), had defaulted after this Court's remand in *Halpern and Seltzer v. Federal Communications Commission,*[2] and that this default had deprived the Commission of the opportunity of granting the frequency on the basis of comparative findings to the best qualified applicant; (b) that the Commission, in comparing the original three applicants, had determined

---

[1] The West Jersey Motion was filed in connection with West Jersey's Opposition to a December 11, 1964 Motion filed by the Commission wherein the Commission requested that the case be remanded to the Commission for action in accordance with a Commission Report and Recommendation issued December 10, 1964. In that December 10 Report and Recommendation, the Commission indicated that upon remand it would grant the frequency at issue in this proceeding to Burlington. The Commission also indicated it would not accept the application of Intervenor West Jersey, and that it would not hold comparative hearings between Burlington and West Jersey to determine which of the applicants should be awarded the frequency.

[2] ___ U.S. App. D.C. ___, 331 F.2d 774, cert. den. October 12, 1964, sub nom. Mount Holly-Burlington Broadcasting Co. v. Halpern and Seltzer.

that Burlington was not to be preferred, and therefore an award to Burlington would constitute an award "by default" rather than an award based upon merit; (c) that the Farina default had severely affected the Farina creditors who would be left without any effective remedy or opportunity for reimbursement if the Commission's proposed award to Burlington became final since Burlington has not offered to repay these creditors, whereas West Jersey has offered to pay them in full, and therefore acceptance of the West Jersey application would not only afford the Commission the opportunity to choose a better qualified applicant than Burlington, but also to do so in a manner whereby innocent creditors could be protected;[3] and (d) that the Burlington application was originally filed in 1958 and the proceeding is now seven years old, thereby rendering the record stale. John C. Giordano, Receiver of the assets of Mt. Holly-Burlington Broadcasting Company, Inc. (hereinafter referred to as "Receiver") also filed a Motion requesting similar affirmative relief.

2. The Commission opposed West Jersey's and the Receiver's requests for affirmative relief. The Commission, however, did not address itself to the merits of the West Jersey Motion, or to the important matters of substance raised therein in connection with this Court's implementation of its duties under Section 402(h). The Commission's Opposition was based solely on the allegation that the request was "premature."[4] Intervenor Burlington, however, filed lengthy and detailed Oppositions to West Jersey's and the Receiver's requests for affirmative relief and addressed itself fully and completely to all of the procedural and substantive matters raised therein. Burlington fully briefed

---

[3] West Jersey did not urge that it be preferred merely because it would pay Farina's debts. It did urge, however, that the Commission erred in failing to take these claims into consideration in determining whether or not the Commission should reopen the record and accept applications such as West Jersey's.

[4] This Court was clearly correct in holding that the Commission's "premature" argument was erroneous. See pp. 6-8 of the West Jersey Motion For Leave to Intervene and pp. 5-6 of its Reply to Opposition to Motion for Leave to Intervene.

and argued all of the points raised by West Jersey and the Receiver, and alleged that the relief sought should not be granted.

3. The Court, after full consideration of the papers, and all of the arguments contained therein,[5] granted the relief requested by West Jersey and the Receiver by Order of March 17, 1965.

4. The Commission has now filed a Petition for Rehearing before the same panel which decided the motion. It has not requested rehearing *en banc*. Burlington has also requested rehearing before the panel, but it has requested, in the alternative, that the matter be heard by the full bench. It is respectfully submitted that these requests are without merit and must be denied.

The Commission Petition for Rehearing Before the Panel

5. The Commission in its Petition for Rehearing has still not addressed itself to any of the substantive or procedural matters raised by West Jersey in its Motion for Affirmative Relief. The Commission has merely stated its belief that the Court's granting of the West Jersey Motion was erroneous, although it has not indicated in detail or otherwise its reasons for this position, nor has it indicated in what manner the Court erred in its March 17 Order. Indeed, the only grounds which the Commission urges as justifying a rehearing of the Motion is that allegedly the Court acted "without affording an opportunity for these issues [i. e., the issues raised by the West Jersey Motion] to be briefed and argued on their merits." (Commission Petition, p. 2)

6. This argument, however, is without merit. The Commission has in no sense been deprived of the full opportunity to brief and argue all of the matters raised by West Jersey and by the Receiver. The West Jersey Motion was a request directed to the exercise of the Court's original jurisdiction. West Jersey filed its Motion for Affirmative Relief in the same way as any litigant would file motion papers requesting this

---

[5] These papers include Replies filed by Burlington and by the Receiver.

Court to take appropriate action. Any party wishing to oppose the Motion had full opportunity to do so, as is evidenced by the fact that Intervenor Burlington filed a lengthy and detailed pleading opposing the Motion, and briefing and arguing all of the substantive issues which were raised both by Burlington and by the Receiver. The Commission itself filed an Opposition, although it affirmatively chose *not* to address itself to any of the substantive points raised by West Jersey, but merely to rest on an erroneous argument that the matter was "premature". It is simply erroneous for the Commission now to assert that this Court in any way "deprived" it of the opportunity to meet all of the issues raised by the motions papers, particularly when it had precisely the same opportunity as did Intervenor Burlington, an opportunity of which Burlington took full advantage.

7. More important, however, it must be emphasized (as the Commission fails to point out in its Petition for Rehearing) that this is *not* a case in which the issues before the Court were unilluminated by adversary presentation. This is not a case where only one side of the issues was placed before the Court. The Commission is correct in stating that the matters raised by West Jersey were "substantial". However, West Jersey, Burlington, and the Receiver fully addressed themselves to all the procedural and substantive aspects of the questions presented, and the Court had before it as complete an adversary presentation on all of the issues as it would have if the case were to be briefed in the manner followed on a formal appeal from Commission action. It is an exaltation of form over substance to urge, as the Commission apparently does, that the lengthy and detailed motions papers filed by West Jersey, Burlington and the Receiver were not "briefs". Yet, despite the fact that all of the issues were fully explored, the Commission *even now has not indicated in any way what arguments it would make or what positions it would urge which have not already been considered by this Court and rejected.* It is one thing for a litigant, setting forth reasons why a decision was erroneous, to urge rehearing on the grounds that its position has never been put before the Court. It is quite another to

argue, as does the Commission here, that rehearing is appropriate where the matter has, in fact, been the subject of a full adversary presentation, and where the Commission does not even now indicate what arguments, if any, it would make which would differ from those already made and which were already considered and rejected by this Court.

8. Finally, it is clear that this Court's excercise of its discretion under Section 402(h), was clearly correct, and is most suited to the satisfaction of the public interest, convenience and necessity. This Court clearly recognized that the unique circumstances of this case require that the proceedings be reopened, that the West Jersey application be accepted for filing, and that the grant of the frequency must be made on the basis of the comparative process best suited to bring forth the most (rather than the least) qualified applicant. Further, this procedure is essential for the recognition in some meaningful way of the equitable claims of the innocent Farina creditors. Moreover, the Court's decision gives recognition to the staleness of the record. The Commission has not set forth a single reason why this Court was erroneous in making these determinations, nor has it even addressed itself to these matters. Under these circumstances, it is clear that the Commission's request for rehearing should be denied.

Burlington Petition for Rehearing or In the Alternative Petition for Rehearing En Banc

9. Burlington has requested either that the case be reheard before the original panel, or that it be reheard *en banc*. However, it urges different grounds as the basis for its requests. Burlington argues that this Court erred in granting the relief sought since allegedly the Court's action was "contrary to the standards of judicial review of actions of an administrative agency" (Burlington Petition, pp. 1-2). Burlington further argues that in granting the relief this Court "departed from established standards of judicial review of agency action and, in effect, arrogated to itself the powers and responsibilities vested by the Congress in the Commission." (Burlington Petition, pp. 5 and 6). The balance of the Burlington

pleading is devoted to citations from numerous cases in which the Court exercised its *appeal* or *review* jurisdiction over the Commission.

10. It is clear, however, that the very nature of these arguments demonstrates that Burlington misunderstands or misconstrues the nature of the issues here involved. As West Jersey demonstrated in its Motion, the request here sought is *not* directed to this Court's appeal or review jurisdiction. This case is *not* in the nature of an appeal from a Final Order wherein this Court is obligated to defer to the Commission's expertise and discretion, the situations which were involved in the cases cited in the Burlington Petition. On the contrary, the normal standard of *review* applied by this Court to Commission action is simply not here involved. The relief sought here pursuant to Section 402(h) is directed to this Court's *original* and not to its reviewing authority. The background and legislative history of Section 402(h)[6] make it clear that the Commission *does not have any discretion whatsoever* to reopen a proceeding after a remand by the Court of Appeals. In enacting Section 402(h), the Congress *deprived* the Commission of the power to exercise its discretion and grant the relief here sought by West Jersey. The Congress vested the power to order a proceeding reopened, and the power to order that new applications be accepted for filing, solely in this Court as a matter of original jurisdiction. All of the arguments made by Burlington concerning the standards normally applied by this Court in reviewing actions entrusted by Congress to administrative discretion are therefore not at all pertinent since the relief requested here was specifically *not* entrusted to the discretion of the Federal Communications Commission, but was vested in this Court by virtue of Section 402(h) of the Communications Act.

11. Burlington is, in fact, really arguing that the Court is without power or jurisdiction to grant the relief sought, an argument which it made in its Opposition to the West Jersey Motion, and an argument which

---

[6] This background was more fully set out in the West Jersey Motion, pp. 6-7, to which the Court is respectfully referred.

must fail in light of the clear wording and purpose of Section 402(h) of the Communications Act. It is particularly pertinent to note that even the Commission has not made this argument, and has not argued that the Court is without power to carry out its clear duties and responsibilities pursuant to Section 402(h).

12. One further point should be noted. The Commission and Burlington argue that the Court's March 17, 1965 Order directed the Commission to grant the Receiver's application for the assignment to it of the construction permit which was originally granted to Farina; they argue that this "direction" is invalid since this Court cannot "direct" the Commission to grant an application. This charge, however, misconstrues the nature and meaning of the Court's Order. The Receiver is, in fact, now operating Station WJJZ under direct instructions of the Court of the State of New Jersey. The station is now being operated by the Receiver with the full knowledge and consent of the Commission; the Commission has not even intimated that it desires such operations to cease. The only reason the Receiver filed his request for involuntary assignment of permit from Farina to him is because the Commission's Rules specifically *require* that such an application be filed by a Receiver any time a change in station ownership results from involuntary action pursuant to appropriate Court authority.[7] The Receiver made it quite clear, however, that he was not in any sense requesting *permanent* authorization to operate Station WJJZ. The application for assignment merely represents, in effect, a formal request for authority to operate the station *pendente lite* since the Receiver obviously does not wish to continue to operate the station without some type of formal authorization from the Commission. The most expeditious way of handling this matter is for the Commission to grant the involuntary assignment of permit *pendente lite*. The Court's March 17 Order was clearly meant only to give the Commission the authority to do so since under Section 402(h) the Commission could *not* grant the application (or indeed take *any* action in the case) without the Court's permission.

---

[7] See Section 1.541 of the Commission's Rules.

13. In any event, this ancillary matter of determining the procedural method by which Station WJJZ can continue to operate cannot be allowed to obscure the important substantive issues to which the Court has addressed itself, i. e., the importance of the Commission's accepting the applications of qualified applicants for the frequency and determining, on the basis of the comparative process, the best qualified applicant.

WHEREFORE, in view of the above, it is respectfully requested that the Petitions for Rehearing filed by the Commission and by Burlington are without substance and should be denied.

Respectfully submitted

PAUL DOBIN

MARTIN J. GAYNES
317 Cafritz Building
Washington, D. C. 20006

April 14, 1965

Attorneys for West Jersey
Broadcasting Company

CERTIFICATE OF SERVICE

Martin J. Gaynes does hereby certify that he has this 14th day of April, 1965, sent by first class United States mail, postage prepaid, a copy of the foregoing OPPOSITION TO PETITION FOR REHEARING FILED BY THE FEDERAL COMMUNICATIONS COMMISSION AND OPPOSITION TO PETITION FOR REHEARING OR IN THE ALTERNATIVE PETITION FOR REHEARING EN BANC FILED BY BURLINGTON BROADCASTING COMPANY to the following:

Philip Bergson, Esq.
Wilner & Bergson
1343 H Street, N. W.
Washington, D. C. 20005
Counsel for William S. Halpern and Louis N. Seltzer, d/b/ as Burlington Broadcasting Company

John Conlin, Esq.
General Counsel's office
Federal Communications Commission
Washington, D. C. 20554

Theodore Baron, Esq.
Scharfelt, Bechoefer, Baron & Stambler
1710 H Street, N. W.
Washington, D. C. 20006
Counsel for the Receiver

Herbert M. Schulkind, Esq.
Fly, Shuebruk, Blume and Gaguine
1612 K Street, N. W.
Washington, D. C. 20006
Former Counsel for Mt. Holly Burlington Broadcasting Company

Martin J. Gaynes

CASILLAS PRESS
921 Seventeenth Street, N.W.
Washington, D.C. 20006
347-5527

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED MAR 17 1965

WILLIAM S. HALPERN AND LOUIS N. SELTZER
d/b as BURLINGTON BROADCASTING COMPANY,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

MOUNT HOLLY-BURLINGTON BROADCASTING CO., INC.,
Intervenor,

WEST JERSEY BROADCASTING COMPANY,
Intervenor,

JOHN C. GIORDANO, RECEIVER,
Intervenor.

Case No. 17,988

OPPOSITION OF JOHN C. GIORDANO, RECEIVER, TO PETITIONS FOR REHEARING

Comes now John C. Giordano, Receiver of Mount Holly-Burlington Broadcasting Co., Inc., and opposes the "Petition for Rehearing" filed April 1, 1965, by the Federal Communications Commission, and the "Petition for Rehearing or in the Alternative Petition for Rehearing En Banc" filed April 1, 1965, by William S. Halpern and Louis N. Seltzer, d/b as Burlington Broadcasting Company.

I. The Commission's Petition for Rehearing

A. The Commission's Petition for Rehearing erroneously alleges that the Court has resolved the issues herein "without affording an opportunity for these issues to be briefed and argued on their merits." The following facts are significant in evaluating the Commission's allegation:

1. The Court's rules clearly provided full opportunity to all parties to make full presentations of their positions and to argue in their pleadings the merits of the issues involved herein. All the parties except the Commission accepted the opportunity and addressed themselves fully to the merits of the issues raised by the Commission's Motion for Remand.

2. The Commission did not request that the Court order the filing of formal briefs and the holding of oral argument. Even now the Commission argues only that "it would be appropriate" for the parties to file formal briefs and argue (orally, it is presumed).

It is clear from the foregoing that the Commission did not believe the matters here involved were sufficiently important for the Commission to plead to the substance of the issues raised by the pleadings of John C. Giordano, Receiver, and West Jersey Broadcasting Company, or to ask leave to file formal briefs and formal (oral) argument. Consequently, it must be concluded that the Commission's subject petition for rehearing is based solely upon the disappointment of the Commission in having its recommendations to this Court rejected.

B. The only other argument of the Commission is that the Order of the Court herein filed March 17, 1965 improperly directs the Commission to grant the Receiver's application (FCC

Form 316) for assignment of the construction permit to the Receiver. The Commission's entire argument consists of the following sentence:

> "This action, if intended, is we believe unprecedented and runs clearly counter to the repeated assertions of this Court that the grant or denial of an application involve determinations which the Commission alone may make."

Under the facts of this case, it is clear that the Court has not substituted its discretion for that of the Commission; the Court has only ordered the performance of a ministerial act by the Commission.

The application, which consists of one sheet of paper (a copy of which is attached hereto), indicates at the "General Instructions," Item 7, that such an application should be used when there is "an involuntary transfer to an Executor, Administrator, or other Court-appointed officer caused by death or legal disability." At the same place, there is a note which states that the application form does not cover assignments or transfers to the "ultimate beneficiary." Instruction B reserves to the Commission the right to require refiling of the application on detailed (long) forms if the Commission so desires. Question 10(b)(1) states "In the case of bankruptcy, or legal disability of the Assignor (or Transferor), attach * * * certified copy of all Court orders pertaining to the assignment (or transfer)." Section 71.541 of the Commission's rules

also indicates that the Commission requires the filing of a Form 316 application in such cases as the appointment of a Receiver for a permittee corporation.

The Receiver here, appointed by the Superior Court of the State of New Jersey, complied with the Commission's evident requirements and filed a properly executed Form 316 application. The Commission has not requested any further filing by the Receiver and has specifically told this Court that the operation of the Station by the Receiver pendente lite is satisfactory to it. Furthermore, Station WJJZ is on the air under so-called program test authority which permits the Commission to take the Station off the air if it believes the public interest would be served thereby.

Consequently, it is clear that the Commission understands that the Receiver has not requested any permanent authority to operate Station WJJZ, that the public interest would be served by having Station WJJZ remain on the air pending the conclusion of litigation, that the Commission has full control over the operation of the Station so that any operation not in the public interest can be stopped, and that the involuntary assignment of construction permit requested by the Receiver was required by the Commission. It appears, therefore, that the Commission is merely advancing a legalistic argument because of its disappointment at the refusal of the Court to

approve the Commission's proposed disposition of the case. It was satisfactory to the Commission to urge the continuance of operation by the Receiver pendente lite if the Court acted in accordance with the Commission's views. Surely, it must be satisfactory to the Commission (in the absence of any evidence of improper operation of Station WJJZ) for the Receiver to continue to operate the Station pendente lite even if the Court's view of the nature of future litigation is different from the Commission's idea.

Under the foregoing circumstances, including the acquiescence of the Commission in the operation of the Station by the Receiver pendente lite and the failure of the Commission to ask for any further information for filing by the Receiver, there is only a ministerial act to be performed by the Commission in granting the Form 316 application. As heretofore pleaded by the Receiver, the assignor is no deader than a deceased individual permittee or licensee in the situation where the Commission regularly grants assignment to an executor or administrator. Thus, in this case, the Court's Order does not substitute the Court's discretion for the Commission's discretion, but simply orders the Commission to adhere to it's policy and practice in Form 316 application cases.

II. Halpern and Seltzer's Petition for Rehearing

A. The Halpern and Seltzer petition erroneously alleges that the Court arrogated to itself powers and responsibilities vested by Congress in the Commission exclusively. Erroneously the petition contends that the Court may do nothing more than determine whether the Commission's proposed Order herein is based upon substantial evidence.

This allegation is based fundamentally on a misapplication of the Supreme Court's decision in Securities and Exchange Commission v. Chenery Corporation, 332 U.S. 194, 1947. The entire decision in Chenery revolves around a basic fact which does not exist in the instant case. Thus, the Court's decision in Chenery says:

> "When the case was first here, we emphasized a simple but fundamental rule of administrative law. That rule is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency." (Id., at 196. Emphasis supplied.)

Unlike the circumstances in the Chenery case, Section 402(h) of the Communications Act of 1934, as amended, specifically authorizes this Court to go beyond the rule of law quoted above. Under Section 402(h) the Court may properly direct the Commission to reopen a record and admit newcomers into a hearing proceeding. Of course, the Court is always subject to contentions by private litigants to the effect that the

Court has exercised its authority unwisely, and that is what Halpern and Seltzer really contend.

It is submitted, however, that Halpern and Seltzer are urging the Court to elevate their personal welfare (i.e., investment of time and money in a seven-year old proceeding) above considerations of the public interest in having cases decided on a reasonably fresh record after comparative consideration.

B. Halpern and Seltzer, like the FCC, also attack the Court's action with respect to the application (Form 316) of the Receiver for involuntary assignment of the construction permit of Station WJJZ. This argument has been fully answered above, but the petition raises this question:

> "In the event the station earns a profit the question posed is--Will Farina enjoy such profits? And if not Farina, who?"

As a practical matter, there is no chance that Station WJJZ will ever earn during litigation enough money to repay the creditor whose interests are represented by the Receiver appointed by the Superior Court of New Jersey. Consequently, Mr. Farina will not "enjoy such profits," and the profits, if any, will be distributed to the creditor represented by the Receiver.

Theoretically and fancifully, consideration can be given to the situation in which the creditor were repayed in full

by profits from operation pendente lite by the Receiver. In this event, the Receiver would have fulfilled the function which he was appointed to perform by the New Jersey Court, and the Receiver would be required to relinquish his receivership. As the assignee of WJJZ, the Receiver would, of course, refer the continued operation to the Commission for whatever action the Commission might wish to take. However, all such speculation is unrealistic and should not form the basis of action by the Court.

C. Turning to the question of the authority of the Court to direct the Commission to accept the applications of West Jersey Broadcasting Company and any other qualified applicants for the facilities involved, it seems clear that the Court's Order must be understood reasonably and not contentiously, and means that the specific waiver requested by West Jersey should be granted. In the case of the application of West Jersey Broadcasting Company, it must be assumed by the Court that there are no reasons, except for the rule requested to be waived, for not accepting for filing the application of West Jersey Broadcasting Company. Surely the Commission would not have kept silent heretofore if there were reasons other than the "cut-off" rule for rejecting the West Jersey Broadcasting Company's application. In the case of new applications which may be filed, the Commission has been directed to waive the "cut-off" rule. Other departures from the Commission's rules

fatal to acceptance of applications would, of course, be routinely evaluated by the Commission.

WHEREFORE, it is respectfully requested that the subject petitions for rehearing be denied.

Respectfully submitted,

Arthur W. Scharfeld

Theodore Baron

Attorneys for
John C. Giordano, Receiver

Scharfeld, Bechhoefer & Baron
1710 H Street, N. W.
Washington, D. C. 20006

April 14, 1965

CERTIFICATE OF SERVICE

I, Theodore Baron, do hereby certify that I have mailed true copies of the foregoing "Opposition of John C. Giordano, Receiver, To Petitions for Rehearing" this 14th day of April, 1965, to each of the following:

Henry Geller, General Counsel
Federal Communications Commission
Washington, D. C. 20554

Paul Dobin, Esq.
Cohn & Marks
317 Cafritz Building
Washington, D. C. 20006
Counsel for West Jersey Broadcasting Company

Arthur Scheiner, Esq.
Wilner & Bergson
1343 H Street, N. W.
Washington, D. C. 20005
Counsel for Burlington Broadcasting Co.

Herbert N. Schulkind, Esq.
Fly, Shuebruk, Blume, and Gaguine
1612 K Street, N. W.
Washington, D. C. 20008
Counsel for Mt. Holly-Burlington Broadcasting Co., Inc.

Theodore Baron

FCC Form 316
June 1963

Form Approved
Budget Bureau No. 52-R124.7

UNITED STATES OF AMERICA
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. - 20554

APPLICATION FOR CONSENT TO ASSIGNMENT OF RADIO BROADCAST STATION CONSTRUCTION PERMIT OR LICENSE OR TRANSFER OF CONTROL OF CORPORATION HOLDING RADIO BROADCAST STATION CONSTRUCTION PERMIT OR LICENSE
(Short Form)

GENERAL INSTRUCTIONS

A. This form is to be used when applying for authority for Assignment of a Radio Broadcast Station Construction Permit or License or for Consent to Transfer of Control of Corporation Holding Radio Broadcast Station Construction Permit or License where:

1. There is an assignment from an individual or individuals (including partnerships) to a corporation owned and controlled by such individuals or partnerships without any substantial change in their relative interests.
2. There is an assignment from a corporation to its individual stockholders without effecting any substantial change in the disposition of their interests.
3. There is an assignment or transfer by which certain stockholders retire, provided that the interest transferred is not a controlling one.
4. There is a corporate reorganization which involves no substantial change in the beneficial ownership of the corporation.
5. Where there is an assignment or transfer from a corporation to a wholly owned subsidiary thereof or vice versa, or where there is an assignment from a corporation to a corporation owned or controlled by the assignor stockholders without substantial change in their interests.
6. There is an assignment of less than a controlling interest in a partnership.
7. There is an involuntary transfer to an Executor, Administrator or other court appointed officer caused by death or legal disability. (Note: This form does not cover assignments (or transfers) from the Executor, Administrator or other court appointed officers to the ultimate beneficiary.)

B. The Commission reserves the right to require refiling of the application on Forms 314 or 315 if in its judgement this form does not apply to the assignment or transfer when approval is sought.

C. Number exhibits serially in the space provided in the body of the form and list each exhibit in the space provided on the back of this sheet. Date each exhibit.

D. The names of the applicants shall be the exact corporate names, if corporations; if partnerships, the names of all partners and the names under which the partnerships do business; if unincorporated associations, the names of executive officers, their offices, and names of the associations.

E. Information called for by this application which is already on file with the Commission need not be refiled in this application provided (1) the information is now on file in another application or FCC form filed by or on behalf of these applicants; (2) the information is identified fully by reference to the file number (if any), the FCC form number, and the filing date of the application or other form containing the information and the page or paragraph referred to and (3) after making the reference, the applicants state: "No change since date of filing." Any such reference will be considered to incorporate into this application all information, confidential or otherwise, contained in the application or other form referred to. The incorporated application or other form will thereafter, in its entirety, be open to the public.

F. This application shall be personally signed by the applicant, if the applicant is an individual; by one of the partners, if the applicant is a partnership; by an officer, if the applicant is a corporation; by a member who is an officer, if the applicant is an unincorporated association; or by the applicant's attorney in case of the applicant's physical disability or of his absence from the United States. The attorney shall, in the event he signs for the applicant, separately set forth the reason why the application is not signed by the applicant. In addition, if any matter is stated on the basis of the attorney's belief only (rather than his knowledge), he shall separately set forth his reasons for believing that such statements are true.

G. **PREPARE AND FILE THREE COPIES OF THIS FORM AND ALL EXHIBITS WITH FEDERAL COMMUNICATIONS COMMISSION, WASHINGTON, D. C. - 20554**

H. **BE SURE ALL NECESSARY INFORMATION IS FURNISHED AND ALL PARAGRAPHS ARE FULLY ANSWERED. IF ANY PORTIONS OF THE APPLICATION ARE NOT APPLICABLE, SPECIFICALLY SO STATE. DEFECTIVE OR INCOMPLETE APPLICATIONS MAY BE RETURNED WITHOUT CONSIDERATION.**

File No.

1. Application for: *(Check One)*
☐ Consent to Assignment ☐ Consent to Transfer of Control

2. Name and post office address of assignor (or transferor)

3. Send notices and communications to the following-named person at the post office address indicated

4. Name and post office address of assignee (or transferee)

5. Name and post office address of licensee (or permittee)

6. Authorization which is proposed to be assigned or transferred:

Call letters	Location

Class of station *(AM-FM-TV)* File number

7. Authorizations of any Remote Pickup, STL, or other stations held by licensee (or permittee) which are to be assigned or transferred:

Call letters	File number

8. State file numbers of any other pending applications which involve the licensee (or permittee)

9. Attach as Exhibit No. _____ a full narrative statement of the circumstances leading to the assignment (or transfer) and the reasons therefor. Fill out Item 15 to show the disposition of stock (or partnership interests) both before and after the proposed assignment (or transfer). The name, residence, citizenship and office, if any, of each stockholder (or partner) should also be shown.

10. a. If the assignment (or transfer) is voluntary:

(1) Attach as Exhibit No. _____ all contracts, agreements or understandings (the substance of oral agreements should be reduced to writing) by which the stock (or other interest) is transferred.

(2) Attach as Exhibit No. _____ a certified copy of the resolution or other instrument authorizing the assignment (or transfer).

(3) Attach as Exhibit No. _____ three copies *(ONE COPY CERTIFIED)* each of Articles and Bylaws, if assignee or transferee is a corporation, or three copies *(ONE COPY SIGNED)* of the partnership agreement if the assignee or transferee is a partnership. *(ARTICLES MUST BE CERTIFIED BY SECRETARY OF STATE OR OTHER PROPERLY DESIGNATED STATE OFFICIAL AND BYLAWS MUST BE CERTIFIED BY APPROPRIATE OFFICIAL OF THE COMPANY.)*

b. If the assignment (or transfer) is involuntary:

(1) In the case of bankruptcy, or legal disability of the assignor (or transferor), attach as Exhibit No. _____ certified copy of all court orders pertaining to the assignment (or transfer).

(2) In case of death of the assignor (or transferor), attach as Exhibit No. _____ the Will or Letters Testamentary and all pertinent court orders.

FCC Form 316

11. Attach as Exhibit No. _____ a statement showing the consideration or thing of value, if any, which is to be given for the stock or interest being assigned (or transferred). If the consideration is monetary, this statement should indicate exactly to whom it is being paid, the source of the funds, the terms and conditions of payment, and a current balance sheet of the assignee (or transferee) must be attached to the statement. If the contract contains a termination date it should be specifically stated.

12. In case of an assignment attach as Exhibit No. _____ a detailed projected balance sheet showing assignee's financial condition as of date of balance sheet requested in question 11 as it would appear had all the provisions involved in this application been complied with on that date.

13. Attach as Exhibit No. _____ a statement showing other broadcast interests of each new stockholder or partner.

14. Does the assignee (or transferee) propose to continue present program policies and schedules without substantial change? Yes ☐ No ☐

If the answer is "No", attach as Exhibit No. _____ a full statement showing a percentage breakdown in terms of types of programs, a composite week breakdown, a specific statement as to the amount of time to be used for commercial programs and a narrative account of new or proposed program policies.

15. In the following table, in all cases, the interest held before and after transfer must be given in terms of percentages. In the case of corporations, the interest must be stated in terms of shares of stock held as well as the percentage equivalent thereof.

NAME AND RESIDENCE OF STOCKHOLDER, PARTNER, ETC. (CITY AND STATE ONLY)	CITIZENSHIP	INTEREST HELD				TOTAL SHARES OUTSTANDING IF A CORPORATION	
		Before Transfer or Assignment		After Transfer or Assignment			
		Shares	%	Shares	%	Before Transfer or Assignment	After Transfer or Assignment

16. If legal counsel were employed in the preparation or presentation of this application, give name and mailing address

For assignor (or transferor)

For assignee (or transferee)

The applicants waive any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise, and request consent to assignment of this license or transfer of control over the licensee corporation in accordance with this application. (See Section 304 of the Communications Act of 1934) The applicants represent that this application is not filed for the purpose of impeding, obstructing, or delaying determination on any other application with which it may be in conflict. All the statements made in this application and attached exhibits are considered material representations, and all the exhibits are a material part hereof and are incorporated herein as if set out in full in this application. The applicants, or the undersigned on the applicants' behalf, state that they have endeavored to supply full and correct information as to all matters which are relevant to this application and that they have done so as to all matters within their own knowledge.

CERTIFICATION

I certify that the statements in this application are true, complete, and correct to the best of my knowledge and belief, and are made in good faith.

_____
Name of Assignor (or Transferor)

By _____ (signature

Title _____ Date _____

_____
Name of Assignee (or Transferee)

By _____ (signature

Title _____ Date _____

WILLFUL FALSE STATEMENTS MADE ON THIS FORM ARE PUNISHABLE BY FINE AND IMPRISONMENT. U.S. CODE, TITLE 18, SECTION 1001

EXHIBITS furnished as required by this form

EXHIBIT NO.	QUESTION NO. OF FORM	NAME OF OFFICER OR EMPLOYEE (1) BY WHOM OR (2) UNDER WHOSE DIRECTION EXHIBIT WAS PREPARED (SHOW WHICH)	OFFICIAL TITLE

2776 6 85

F.C.C. - WASHINGTON, D. C.